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Supreme Court, U.S.
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NO. 95-544

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARLENE KURTZ,

Petitioner,

vs.

CITY OF NORTH MIAMI, FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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61 pp

QUESTION PRESENTED FOR REVIEW

Whether the City of North Miami's regulation requiring that any applicant for any City job execute, as a condition of applying for employment, an affidavit stating that he or she has not smoked or used tobacco products for the preceding twelve months violates the Due Process Clause of the Constitution of the United States, where the regulation is conceded by the City to be unrelated to job functions or performance and where the City's only asserted justification for the regulation is the reduction of costs resulting from smoking-related illnesses.

PARTIES TO THE PROCEEDING

All parties are named in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Arlene Kurtz petitions for a writ of certiorari to review the decision of the Supreme Court of Florida in this case.

OPINIONS BELOW

The opinion of the Dade County, Florida Circuit Court (App. A-24) is unreported. The opinion of the Florida Third District Court of Appeal is reported at 625 So.2d 899 (Fla. Dist. Ct. App. 1993). The opinion of the Florida Supreme Court (App. A-35) is reported at 653 So.2d 1025 (Fla. 1995). The Florida Supreme Court's order denying Arlene Kurtz's motion for rehearing (App. A-42) is unreported.

JURISDICTION

The Florida Supreme Court entered judgment in this case on April 20, 1995. (App. A-35). It denied a timely motion for rehearing on July 5, 1995. (App. A-42). This Court has jurisdiction pursuant to title 28 United States Code section 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED IN THIS CASE

This case involves the validity of Administrative Regulation 1-46 of the City of North Miami, Florida. (App. A-1). The case arises under the Due Process Clause of the Constitution of the United States, amendment 14, (App. A-3), and title 42 United States Code section 1983. (App. A-3).

STATEMENT OF THE CASE

This case arises from a Florida state court suit by petitioner Arlene Kurtz against the City of North Miami, Florida for injunctive and declaratory relief to prevent the enforcement of Administrative Regulation 1-46, which requires that any applicant for any job with the City of North Miami execute an affidavit stating that the applicant has

not used tobacco products for the preceding twelve months. (App. A-1, A-4).

The trial court, on cross-motions for summary judgment, upheld the validity of Administrative Regulation 1-46 against Kurtz's challenge under the Due Process and Equal Protection guarantees of the United States and Florida constitutions and under the Florida constitutional right of privacy. (App. A-24). The Florida Third District Court of Appeal reversed, holding that the regulation violated the explicit privacy guarantee of article I, section 23 of the Florida Constitution. *Kurtz v. City of North Miami*, 625 So.2d 899 (Fla. Dist. Ct. App. 1993). The Supreme Court of Florida quashed the district court's decision, holding that the regulation did not violate the Florida constitutional privacy provision. *City of North Miami v. Kurtz*, 653 So.2d 1025, 1027-28 (Fla. 1995) (App. A-37 to A-39). The Florida Supreme Court then went on to expressly hold that Administrative Regulation 1-46 in no way implicated any privacy or liberty interest implicit in the United States Constitution, and was therefore valid under federal as well as state constitutional law. *Id.* at 1028-29 (App. A-39).

On September 29, 1988, petitioner Arlene Kurtz submitted an employment application to the City of North Miami, Florida. In December 1989, the Kurtz took and passed a written examination required for all prospective applicants for employment by the City of North Miami. (App. A-36).

On March 9, 1990, the City adopted Administrative Regulation 1-46, which requires that "[a]ll applicants must be a nonuser (sic) of tobacco or tobacco products for at least one year immediately preceding application, as evidence (sic) by the sworn affidavit of the application (sic)." (App. A-1).

In May 1990, the City notified Kurtz that there was an opening for a clerk-typist, and made an appointment to interview her for that position. When Kurtz arrived for the interview on May 31, 1990, she was informed by the interviewer that in order to be hired for any job with the City, she would have to sign an affidavit stating that she did not smoke or use tobacco products and that she had not done so within the past twelve months. Kurtz told the interviewer that she could not truthfully sign such an affidavit, and the interview was terminated. (App. A-36).

Because she submitted her application for employment prior to the adoption of Administrative Regulation 1-46, Kurtz was not informed of the regulation until the interview stage. A person seeking to apply for a job after the regulation was adopted would not even be permitted to submit an application unless he or she first signed the affidavit required by the regulation.

Since that terminated interview, Kurtz has not been notified of any other job openings with the City of North Miami. (App. A-10 to A-12). As a smoker, Kurtz is disqualified from reapplying for any job with the City so long as Administrative Regulation 1-46 remains in effect.

Kurtz was in May 1990 and is now qualified for the job of clerk-typist. (App. A-10 to A-12). Kurtz would be willing to abide by a reasonable restriction on smoking while on duty or where smoking would affect her fellow employees or others, as a condition of employment by the City. (App. A-10 to A-12).

Kurtz, who is 52 years old, has smoked for 30 years, and has been unsuccessful in trying to quit smoking. [R. III, pp. 2375-78, 2395 (depo. of Kurtz, pp. 5-8, 25)].[1]

While the City's sole asserted justification for its regulation is the reduction of costs due to smoking-related illnesses, the City does not bar its present employees from smoking or using tobacco, and persons already employed by the City prior to the adoption of the regulation were not required to execute affidavits regarding their present or past smoking or tobacco use as a condition of their continued employment by the City. The regulation only requires abstinence from tobacco use during the one-year period prior to applying for a job, and does not prevent the applicant from starting or resuming smoking or using tobacco once hired. (App. A-36).

The City's regulation against hiring smokers and persons who have used tobacco within the past twelve months applies to all job positions, regardless of whether any particular degree of physical fitness

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1 References to the record in the state court are to volume and page number, e.g., [R. ___, p. ____].

is required for the job. The regulation prohibits any person who has used any tobacco product from applying for any City job, regardless of whether that individual is otherwise qualified for the job. (App. A-10 to A-12). The effect of the regulation is thus that a less-qualified non-smoker may be hired by the City, while a more-qualified smoker would not even be allowed to apply.

City job applicants who are smokers or tobacco users are not individually screened or examined to determine their actual health conditions or medical histories. (App. A-10 to A-12). As to Kurtz, for example, City of North Miami Assistant City Manager Lee Feldman admitted on deposition that the City has no knowledge as to Kurtz's actual health condition. [R. III, p. 2491 (depo. of Feldman, p. 68)].

The City does not offer job applicants who are smokers or tobacco users the option of waiving insurance coverage. (App. A-10 to A-12). The City also does not give smokers the option of paying for any increased insurance costs that may result from their smoking. (App. A-10 to A-12). In the case of Kurtz, she testified at her deposition in this case that she already has her own private health insurance coverage. [R. III, p. 2389 (depo. of Kurtz, p. 19)].

Persons who get past the application and interview stages are given physical examinations before being hired, in order to determine whether they have any preexisting conditions that would be excluded by the City's insurance program, and to determine if they are physically capable of doing the jobs for which they are being considered. (App. A-10 to A-12). However, only tobacco users are automatically screened out at the initial application stage, and thus never given the opportunity to demonstrate whether they in fact have any preexisting health conditions related to smoking or tobacco use that may increase the City's insurance costs, or whether they are, tobacco-use notwithstanding, physically capable of performing their job functions. In effect, as to tobacco users, and only tobacco users, the City indulges an irrebuttable presumption that they are unfit for all City employment.

At no time, before or after implementing Administrative Regulation 1-46, did the City investigate actual health costs or productivity data in order to determine whether off-duty tobacco use had any real effect on the City's health insurance costs or worker productivity. [R. III, pp. 2468-69, 2487, 2500 (depo. of Feldman, pp.

45-46, 64, 78)].

After the fact, in connection with this case, the City retained an expert witness, James M. Shultz, who prepared an affidavit stating, essentially, that smoking causes various diseases and is highly addictive. The City's expert summarized the opinions of several other experts whose estimates of the cost to an employer of an employee's smoking varied from $135 per year to $4,611 per year. Shultz's own estimate was that employee smoking cost an employer $435 per year per male smoker and $349 per female smoker. That affidavit, which was not based on any actual health, productivity or insurance cost data supplied by the City, in fact revealed that from 57 to over 90 percent of the excess costs (such as lost productivity due to cigarette breaks and second-hand smoke) attributed to employee smoking would be eliminated by prohibiting smoking on the job. [R. II, pp. 458-64 (affid. of Shultz, pp. 17-22)].

While the City's sole justification for Administrative Regulation 1-46 is the regulation's anticipated cost-saving impact, there was no assertion in this case that such savings were needed to ensure the operation or fiscal soundness of City government or services.

Assistant City Manager Feldman testified that the City does have in place a voluntary smoking cessation program, but admitted that he did not know or attempt to determine the success rate of that program or whether that program has been or would be effective in achieving the some or all of the same cost savings that Administrative Regulation 1-46 was allegedly designed to realize. [R. III, pp. 2454-55 (depo. of Feldman, pp. 31-32)]. The City's own expert noted that such programs, properly implemented, can have up to a 40 percent effectiveness rate. [R. II, p. 464 (affid. of Shultz, p. 22)].

The petitioner does not dispute that there is evidence to support the conclusion that smoking and tobacco use are linked to a higher risk of certain health problems. The petitioner does not dispute that government employers may restrict, or even ban, smoking in government buildings or during work hours. She does not dispute that a government employer may, in order to reduce costs, implement a voluntary smoking cessation program or similar voluntary measures. She also does not dispute that a restriction on off-duty or even pre-hiring tobacco use may be justified for certain jobs where a particular

level of physical fitness is legitimately needed in order to perform the functions of such jobs.

What is challenged in this case is the City's requirement that all prospective applicants for all City jobs refrain from using tobacco for a year prior to applying, where that requirement is completely unrelated to job functions, performance, or qualifications.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Florida Supreme Court's Decision Upholding Administrative Regulation 1-46 Conflicts with Decisions of this Court Holding that Conditions or Restrictions on Government Employment Opportunities Must Be Rationally Related to Job Functions or Performance.

Due process requires that conditions placed on an individual's right to seek government employment bear, at a minimum, some rational relationship to the functions of the job sought or to the qualifications of the job-seeker.

In *Kelley v. Johnson*, 425 U.S. 238 (1976), the Court held that the Fourteenth Amendment Due Process Clause "affords not only a procedural guarantee against the deprivation of 'liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State." *Id.* at 244.

While Kurtz, as a mere applicant for employment, has no Fourteenth Amendment "property" interest at stake in this case, she does have a substantive liberty interest in being permitted to seek government employment unconstrained by arbitrary and irrational hiring restrictions.[2] *See Keyishian v. Board of Regents*, 385 U.S. 589, 606-07

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2 In the context of a procedural due process claim, the Court has recognized that a state's refusal to hire does not alone implicate due process, but a regulation that would foreclose *all* future employment prospects "would be a different case." *Board of Regents v. Roth*, 408 U.S. 564, 573-74 (1972). In the present case, because Administrative Regulation 1-64 applies to all applicants for

(1967)[3]; *also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77 n.9 (1990); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

In *Kelley*, the Court held that a county's regulation of hair-length for police officers, as part of its extensive regulation of the organization of the uniformed police force, was rationally related to the goals of making uniformed officers more recognizable to the public and to the desire to promote esprit de corps within the force. 425 U.S. at 246-49. The analysis of whether or not the government's asserted justification for the regulation was "sufficiently rational," *id.* at 248, thus turned on whether the regulation had some, at least arguable, bearing on the particular duties of police officers.

The Florida Supreme Court in the present case, while citing and purporting to follow *Kelley*, (App. A-39), identified no aspect of the City of North Miami's regulation that relates in any way, rationally or otherwise, to the functions of the particular clerk-typist job Kurtz was seeking, to Kurtz's qualifications for that job, or to the functions and qualifications of all of the other City jobs and job applicants covered by the regulation. Rather, the Court related the regulation solely to the City's asserted desire to decrease its costs flowing from insurance premiums and employee sick-time. (App. A-39). The reasoning used and the result reached by the Florida Supreme Court are in conflict with *Kelley* and other decisions of this Court requiring a rational relationship between a government hiring regulation and the duties and functions of the job or jobs to which the regulation applies.

The Court's reasoning and holding in *Kelley* are reflected in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), in which the Court upheld a mandatory retirement age for uniformed police officers on the ground that the requirement that such officers retire at age 50 was rationally related to the state's legitimate interest

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all City jobs, Kurtz is effectively barred from City employment in any capacity.

3 "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian*, 385 U.S. at 606-07.

in ensuring the physical preparedness of its uniformed force. *Id.* at 314-15; *also Vance v. Bradley*, 440 U.S. 93, 98-103 (1979).

Likewise in *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), in overturning New Mexico's rule excluding from the practice of law any person who had formerly been a member of the Communist party, the Court held, "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Id.* at 239; *also Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

The circuit courts of appeals have consistently followed this Court's lead in determining the constitutionality of government hiring regulations on the basis of the challenged regulations' rational relationship to job functions or performance. *See, e.g., Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 543 (10th Cir. 1987); *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1367 (11th Cir. 1987) (ordinance preventing shirtless jogging by males not related to any legitimate interest of town); *DiIulio v. Board of Fire and Police Commissioners*, 682 F.2d 666, 668-70 (7th Cir.), *cert. denied*, 459 U.S. 1038 (1982) (police promotion examination rationally related to job functions and candidates' qualifications); *Hander v. San Jacinto Junior College*, 519 F.2d 273, 277 (5th Cir.), *clarified on rehearing granted*, 522 F.2d 204 (5th Cir. 1975) (college faculty grooming code prohibiting beards not rationally related to valid educational purpose); *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973) (hair length rule for college students not rationally related to legitimate educational aims).

Like the various hiring regulations addressed by the courts in the cases cited above, a hiring concerning off-duty smoking must be rationally related to a particular government job's functions in order to comport with due process. The only reported federal decision to address such a restriction is the Tenth Circuit's decision In *Grusendorf v. City of Oklahoma City*. In *Grusendorf*, a fire department rule prohibited firefighter trainees from smoking on or off duty for one year after hiring, and required new hirees to sign an agreement to that effect as a condition of employment. 816 F.2d at 540. The court clearly recognized that the rule implicated protected liberty interests, stating:

> It can hardly be disputed that the Oklahoma City Fire Department's non-smoking regulation infringes upon the liberty and privacy of the firefighter trainees. The regulation reaches well beyond the work place and well beyond the hours for which they receive pay. It burdens them after their shift has ended, restricts them on weekends and vacations, in their automobiles and backyards and even, with the doors closed and the shades drawn, in the private sanctuary of their own homes.

Id. at 541.

While the Tenth Circuit acknowledged that the liberty and privacy interests at issue in the case of a no-smoking rule may not rise to the level of a fundamental right, the Court also emphasized that even non-fundamental rights are entitled to meaningful protection against governmental infringement. The court stated:

> Nor are we inclined to accept the defendants' contention that, since cigarette smoking has not been recognized as a fundamental right, no balancing test nor rationale of any kind whatsoever is needed to justify the restriction. This reasoning would seem to suggest that the state can, arbitrarily and for no reason, condition employment upon an agreement to refrain from a nearly limitless number of innocent, private and personal activities. We would be reluctant to go this far even if the law would tolerate such a venture.

Id. at 542.

In *Grusendorf* the court of appeals upheld the no-smoking rule, but only upon finding a "rational connection between the non-smoking regulation and the promotion of the health and safety of the firefighter trainees." The court noted that good health and physical conditioning are essential requirements for firefighters who "are frequently exposed to smoke inhalation," where "it might reasonably be feared that smoking increases this health risk." *Id.* at 543.

In contrast to the restriction on off-duty smoking upheld in

Grusendorf, the City of North Miami's concedes that its no-smoking hiring regulation has no relationship to the qualifications of the applicants or the requirements of the jobs sought. The City of North Miami's regulation violates due process because it applies to *all* applicants for *all* government jobs, for reasons unrelated to their fitness or qualifications for any particular job.

II. The Florida Supreme Court's Ruling that the City's Asserted Interest in Reducing Costs Resulting from Smoking-Related Illnesses Constitutes a "Rational Basis" for a Hiring Regulation that is Unrelated to Job Functions or Performance and that Intrudes into the Private, Lawful, Off-Duty Conduct of Job Applicants Presents an Important Question of Federal Law Which Has Not Been, but Should Be, Decided by this Court.

In *Watson v. City of Memphis*, 373 U.S. 526 (1963), the Court held, "[I]t is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Id.* at 537; *also Liddell v. State*, 731 F.2d 1294, 1308 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984); *see Reed v. Reed*, 404 U.S. 71, 76 (1971). In this case, however, the City of North Miami quite explicitly asserts its desire to save costs as the sole justification for denying all employment opportunities to individuals who have used tobacco products within one year of applying for a City job.

This Court has never to date expressly addressed the question of whether the interest in saving costs alone can constitute a rational justification for a government hiring restriction which intrudes on a non-fundamental liberty interest, where such intrusion is not otherwise rationally related to job functions or performance.

This case thus presents one of the most important issues in employment law today--the extent to which government employers can regulate, in the name of cost-saving, the private off-duty lives of their employees and job applicants.

Whether the Florida Supreme Court intended such a result or not, its opinion in this case would legitimize governmental intrusion into and regulation of such disparate areas of private life as: body weight,

diet, finances, hobbies, and personal morality, all based solely on the government's asserted interest in saving money.[4]

The real danger presented by this case is that the Florida Supreme Court's decision will open up virtually every aspect of a person's private life to intrusive governmental regulation in the supposed interest of cost-cutting. The effect of that decision may be that, unless the off-duty, pre-hiring or otherwise private activity is one previously recognized as a fundamental right, such as reproductive, religious and family matters, then it can be regulated by the state if it bears any conceivable relationship, not to the government employer's interest in determining and maintaining job functions and performance, but to its interest in lessening, by any amount no matter how small, government costs.

Thus, using the same rationale as that approved by the Florida Supreme Court in this case, a government employer could regulate when its employees or prospective employees go to bed at night, how much beer they drink on the weekends, what they eat for breakfast, what kind of cars they drive, where they take their vacations and what hobbies they engage in, all in the interest of making sure that those employees or applicants meet some ideal of health and fitness and thus cost the government less money to insure. This is the real danger of the Florida Supreme Court's decision, and this is the issue which requires consideration by this Court.

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4 *See* Maltby & Dushman, *Whose Life Is It Anyway--Employer Control of Off-Duty Behavior*, 13 St. Louis Pub. L. Rev. 645 (1994); Smith & Francis, *Beyond the Company Town: Employees' Right to Privacy Regarding Off-Duty Conduct*, 158 N.J. Lawyer 13 (Jan. 1994); Hill & Delacenserie, *Procrustean Beds and Draconian Choices: Lifestyle Regulations and Officious Intermeddlers--Bosses, Workers, Courts, and Labor Arbitrators*, 57 Mo. L. Rev. 51 (1992); Kramer & Calder, *The Emergence of Employees' Privacy Rights: Smoking and the Workplace*, 8 The Labor Lawyer 313, 321-22 (1992).

CONCLUSION

On the basis of the arguments and authorities set forth above, the petitioner Arlene Kurtz requests that the Court grant certiorari to consider the important constitutional questions raised by this case.

Respectfully submitted,

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APPENDIX

ADMINISTRATIVE REGULATION 1-46

CITY OF NORTH MIAMI
ADMINISTRATIVE REGULATIONS

Lawrence J. Casey
City Manager

Administrative Regulation 1-46
Approved /s/ Date 03-09-90

ALL DEPARTMENTS

TOBACCO OR TOBACCO PRODUCTS ABSTENTION AS PRE-EMPLOYMENT REQUIREMENT

OBJECTIVE

To reduce the liability exposure to the City of North Miami recognizing that:

1) the Surgeon General of the United States has declared that use of tobacco or tobacco products is a hazard to an individual's health; and
2) an employee's poor health, due to the continued use of tobacco or tobacco products, increases the loss experience of the group insurance plans and group life insurance plans; and
3) increases in loss experience result in increases in premium cost for insurance plans; and
4) increases in premium costs for employees are borne by the General Fund and subsequently by the taxpayers of the City of North Miami.

To reduce the amount of lost productivity time due to absenteeism and on-the-job time lost to the City of North Miami recognizing that:

1) an employee's poor health, due to the continued use of tobacco or tobacco products, increases the amount of

lost work days and limited activity and thus reduces an employee's productivity; and

2) decreases in employee productivity result in the decrease in efficiency of the City government; and

3) decreased efficiency is not an effective use of taxpayer's dollars.

RESPONSIBILITIES

The Personnel Director is responsible for monitoring the compliance of the provisions of this Administrative Regulation.

PROCEDURES

All applicants must be a nonuser of tobacco or tobacco products for at least one year immediately preceding application, as evidence by the sworn affidavit of the application.

DUE PROCESS CLAUSE, U.S. CONST. AMEND. 14

"No State shall . . . deprive any person of life, liberty, or property, without due process of law."

TITLE 42 UNITED STATES CODE SECTION 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

IN THE CIRCUIT COURT FOR THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 91-3165 (04)

FLA. BAR NO. 444006

ARLENE KURTZ,

Plaintiff,

v.

THE CITY OF NORTH MIAMI,
FLORIDA,

Defendant.
_____/

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

The plaintiff, Arlene Kurtz, sues the defendant, the City of North Miami, and says:

1. This is an action for injunctive and declaratory relief pursuant to title 42 United States Code section 1983 and Florida Statutes section 86.011.

2. The plaintiff, Arlene Kurtz (hereinafter "Kurtz"), is a resident of the City of North Miami, Dade County, Florida.

3. The defendant, the City of North Miami, Florida (hereinafter "the City"), is a Florida municipal corporation.

ALLEGATIONS APPLICABLE TO BOTH COUNTS

4. On or about December, 1989, Kurtz took and passed a written examination required for all prospective applicants for

employment by the City of North Miami.

5. On or about May 1990, the City notified Kurtz that there was an opening for a clerk/typist, and made an appointment with Kurtz to interview her for that position.

6. When Kurtz arrived at the interview on or about May 31, 1990, she was informed by the interviewer that in order to be hired for any job with the City of North Miami, Kurtz would be required to sign an affidavit stating that she did not currently smoke cigarettes or used any other tobacco products and that she had not smoked cigarettes or used any other tobacco products for the past twelve months.

7. Kurtz told the interviewer that she could not truthfully sign such an affidavit. The interviewer then told Kurtz that there was no point in proceeding with the interview, and terminated the interview.

8. Following that terminated interview, Kurtz has not been notified of or considered for any position with the City of North Miami.

9. Aside from her refusal to sign the affidavit required by the City of North Miami, Kurtz was and is qualified for the position of clerk/typist.

10. The City of North Miami has officially adopted a policy requiring all applicants for employment with the City to execute affidavits stating that they do not use tobacco products and have not used tobacco products for the past twelve months (hereinafter referred to as "the policy"). Any person who refuses to sign such an affidavit will not be considered for employment by the City in any capacity or position.

11. The City's policy against hiring smokers and persons who have smoked within the past twelve months applies to all job positions, and prohibits the hiring of such persons, regardless of whether the applicants are otherwise qualified for any particular jobs.

12. The City's stated purpose in adopting this policy is to reduce the City's health insurance costs and is unrelated to the City's legitimate interest in ensuring that applicants for employment are qualified to carry out their duties and responsibilities.

13. The City's stated cost-saving rationale is not a legitimate justification for denial of prospective employees' constitutional rights.

14. The City's policy wrongfully conditions applicants' eligibility for City employment upon their agreeing to relinquish their constitutional privacy and liberty interests in lawful, off-duty conduct unrelated to their job qualifications and performance.

15. By raising an irrebuttable presumption that persons who smoke off-duty or who have smoked within the past twelve months are unqualified for employment by the City in any capacity, the City's policy violates the excluded applicants' rights to due process of law.

16. The City's policy violates due process by barring off-duty smokers and persons who have smoked within the past twelve months from all City employment, and not only from those positions as to which past or present smoking activity is or may be a relevant and rational hiring criterion.

17. The requirement of disclosure by applicants of off-duty smoking activity unrelated to job performance is a violation of due process of law.

18. The City's policy is violative of equal protection because it arbitrarily and on the basis of impermissible criteria distinguishes job applicants who smoke off-duty or who have smoked within the past twelve months from job applicants and present City employees who do not smoke or have not smoked within the past twelve months.

19. The challenged policy violates the right of persons to be free from governmental intrusion into their private lives.

COUNT I--INJUNCTION

20. Paragraphs 1 through 19 are incorporated herein by reference.

21. The City's policy the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws."

22. By implementation and enforcement of its policy, the City has deprived Kurtz of rights secured by the above-cited constitutional provisions.

23. Pursuant to title 42 United States Code section 1983, Kurtz requires and is entitled to an injunction against the City's enforcement of its policy.

WHEREFORE, the plaintiff Arlene Kurtz demands judgment against the City enjoining it from the continued enforcement of the challenged policy, and for attorneys' fees pursuant to title 42 United States Code section 1988, and for costs of this action.

COUNT II--DECLARATORY RELIEF

24. Paragraphs 1 through 19 are incorporated herein by reference.

25. The City's policy violates article I, section 2 of the Florida Constitution, which provides in pertinent part, "All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, [and] to be rewarded for industry . . . ."

26. The City's policy violates article I, section 9 of the Florida Constitution, which provides in pertinent part, " No person shall be deprived of life, liberty, or property without due process of law . . ."

27. The City's policy violates article I, section 23 of the Florida Constitution, which provides in pertinent part, "Every natural person has the right to be let alone and free from governmental intrusion into his private life . . . ."

28. Kurtz requires and is entitled to a declaration by this Court that the City's policy, as a result of which she was denied the opportunity for fair consideration for public employment, violates the above-cited provisions of the Florida Constitution.

WHEREFORE, the plaintiff Arlene Kurtz demands judgment

declaring the City's policy unconstitutional under the Florida Constitution, for such other relief as is necessary and proper to effect the Court's judgment, and for costs of this action.

Dated: January 22, 1991

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

IN THE CIRCUIT COURT FOR THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 91-3165 (04)

ARLENE KURTZ,

Plaintiff,

v.

THE CITY OF NORTH MIAMI,
FLORIDA,

Defendant.
_____/

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff Arlene Kurtz moves the Court, pursuant to rule 1.510 of the Florida Rules of Civil Procedure, for entry of summary judgment in her favor, on the grounds set forth herein.

I. INTRODUCTION

The plaintiff seeks injunctive and declaratory relief against a policy of the defendant City of North Miami, which policy requires all job applicants to execute affidavits stating that they do not smoke or use tobacco products and have not done so within the preceding twelve months.

The plaintiff claims that the policy violates the United States and Florida Constitutions, and seeks an injunction pursuant to 42 United States Code section 1983 and declaratory relief pursuant to Florida Statutes section 86.011.

There is no genuine issue as to any material fact, and the plaintiff is entitled to a judgment as a matter of law. The plaintiff

therefore requests that the Court enter summary judgment in her favor, enjoining the City from enforcing its no-smoking hiring policy and declaring that policy unconstitutional under the U.S. and Florida Constitutions.

II. STATEMENT OF MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE EXISTS

1. The City has officially adopted a policy requiring all applicants for employment with the City to execute affidavits stating that they do not use tobacco products and have not used tobacco products for the past twelve months. (Complaint ¶ 10; Answer ¶ 10; Def's Response to Pltf's Req. for Admissions ¶ 1).

2. Any person who refuses to sign such an affidavit will not be considered for employment by the City in any capacity or position. (Complaint ¶ 10; Answer ¶ 10; Def's Response to Pltf's Req. for Admissions ¶ 2).

3. The effect of the policy is such that, in order even to be considered for any City job, a prospective applicant must forbear to smoke or use tobacco for a period of one year prior to the date of hire. (Def's Answers to Pltf's Interrogs. ¶ 1).

4. While the City's asserted justification for its policy is the reduction of health care costs by preventing smoking related illnesses among its employees (Answer ¶ 32), the City does not bar its present employees from smoking and does not bar new employees, once hired, from beginning to smoke. (Def's Answers to Pltf's Interrogs. ¶ 1).

5. The City's policy against hiring smokers and persons who have smoked within the past twelve months applies to all job positions, and prohibits the hiring of such persons, regardless of whether the persons are otherwise qualified for any particular jobs. (Def's Response to Pltf's Req. for Admissions ¶ 3).

6. Persons already employed by the City prior to the adoption of the policy were not required to execute affidavits regarding their present or past smoking or tobacco use as a condition of their continued employment by the City. (Def's Response to Pltf's Req. for

Admissions ¶ 4).

7. Persons already employed by the City prior to the adoption of the policy were not required to quit smoking or using tobacco products as a condition of their continued employment by the City. (Def's Response to Pltf's Req. for Admissions ¶ 5).

8. City job applicants who are smokers or tobacco users are not individually screened or examined to determine their actual health conditions or medical histories. (Def's Response to Pltf's Req. for Admissions ¶ 7).

9. The City does not offer job applicants who are smokers or tobacco users the option of waiving insurance coverage for smoking related illnesses as a condition of employment. (Def's Response to Pltf's Req. for Admissions ¶ 9).

10. The City does not offer job applicants who are smokers or tobacco users the option of paying any increased insurance premiums or costs resulting from their smoking or tobacco use as a condition of employment. (Def's Response to Pltf's Req. for Admissions ¶ 10).

11. In December 1989, the plaintiff Arlene Kurtz took and passed a written examination required for all prospective applicants for employment by the City. (Complaint ¶ 4; Answer ¶ 4; Affid. of Arlene Kurtz ¶ 2).

12. The City's policy against hiring smokers and persons who have smoked within the past twelve months applies to all job positions, and prohibits the hiring of such persons, regardless of whether the applicants are otherwise qualified for any particular jobs. (Complaint ¶ 11; Answer ¶ 11).

13. In May 1990, the City notified Kurtz that there was an opening for a clerk-typist, and made an appointment to interview her for that position. (Complaint ¶ 5; Answer ¶ 5; Affid. of Arlene Kurtz ¶ 3).

14. When Kurtz arrived for the interview on May 31, 1990, she was informed by the interviewer that in order to be hired for any

job with the City, she would have to sign an affidavit stating that she did not smoke or use tobacco products and that she had not done so within the past twelve months. (Complaint ¶ 6; Answer ¶ 6; Affid. of Arlene Kurtz ¶ 4).

15. Kurtz told the interviewer that she could not truthfully sign such an affidavit, and the interview was terminated. (Complaint ¶ 7; Answer ¶ 38; Affid. of Arlene Kurtz ¶ 5).

16. Since that terminated interview, Kurtz has not been notified of any other job openings with the City of North Miami. (Affid. of Arlene Kurtz ¶ 9).

17. Kurtz was in May 1990 and is now qualified for the job of clerk-typist. (Affid. of Arlene Kurtz ¶ 7).

18. Kurtz would be willing to abide by a reasonable restriction on smoking while on duty or where smoking would affect her fellow employees or others, as a condition of employment by the City. (Affid. of Arlene Kurtz ¶ 8).

III. THE PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

1. Privacy

The City's no-smoking hiring policy constitutes governmental intrusion into the private lives of citizens for the purpose of regulating lawful, off-duty conduct unrelated to any legitimate need of government. For citizens, such as the plaintiff, who refuse to submit to this indirect regulation, the penalty is a denial of all opportunity to seek or obtain employment in City government.

Article I, section 23, of the Florida Constitution provides, "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." This explicit constitutional right of privacy is far broader than that provided by the general due process language of the U.S. Constitution. In re T.W., 551 So.2d 1186, 1192 & n.5 (Fla. 1989); Shaktman v. State, 553 So.2d 148, 151 n.9 (Fla. 1989); Winfield v. Division of Pari-Mutuel

Wagering, 477 So.2d 544 (Fla. 1985). In cases involving violations of the privacy guarantee, the government has the burden of demonstrating a "compelling state interest" justifying the intrusion, and that the "least intrusive means" have been used to accomplish that goal. Shaktman, 553 So.2d at 151-52; In re T.W., 551 So.2d at 1192; Winfield, 477 So.2d at 547.

The decision whether or not to engage in the completely legal use of tobacco products in one's own home and on one's own time is a matter which should be left to the individual. Before the City is allowed to condition employment on the relinquishment of personal autonomy by its citizens, it must demonstrate a compelling state interest justifying that action. The City's asserted interest in reducing its medical costs is not such a "compelling" interest as to justify the challenged hiring policy.

Moreover, even if the City's interest were deemed to be "compelling," the City has clearly not employed the "least intrusive means" of furthering that interest. The City's aim of reducing health care costs could be achieved, for example, by limiting insurance benefits for smoking-related illnesses or by requiring that higher premiums be paid by employees with particular health risks. The City admits that it does not give smoking employees these options. Nor does the City allow smokers to waive health insurance coverage entirely.

That the means chosen are not the least intrusive is obvious when it is noted that the City's policy requires all prospective job applicants to refrain from smoking for a year, in order even to be considered for a City job. Many if not most of those applicants will probably not ever be hired, but they are nonetheless constrained by the policy to give up this lawful conduct in order to have even an opportunity for consideration. Clearly, the City can have no interest in precluding smoking by persons it will not ultimately hire. That the City presumes to dictate such persons' private lives demonstrates that its policy is far from the "least intrusive" that could be devised to obtain its asserted goal of reducing its employees health care costs.

In short, the City could achieve its goal by any number of approaches tailored to the actual health risks and costs presented by individual employees, without resorting to intrusive regulation of employees' private, lawful, off-duty conduct. The City has chosen,

however, to use instead the most intrusive means available--requiring absolute abstinence for a year prior to even being considered for a City job.

The City asserts in its answer that the plaintiff, when she applied for a job with the City, executed a waiver of confidentiality and permission for a background investigation. The City argues that the plaintiff thereby "waived" her constitutional privacy interest. Even if the City's factual allegations are conceded for purposes of this motion, the City's legal argument is flawed. If the City's employment application requires a surrender of one's constitutional right of privacy, then that requirement is itself clearly unconstitutional. See McDonnell v. Hunter, 809 F.2d 1302, 1310 (8th Cir. 1987) (state could not require applicants to give advance consent to unreasonable searches as condition of employment); also Keyishian v. Board of Regents, 385 U.S. 589, 17 L.Ed.2d 629 (1967).

Moreover, the City's position mischaracterizes the purpose and scope of the constitutional privacy guarantee. The right of privacy is not only a right of secrecy or confidentiality. The constitutional right of privacy is the right "to be let alone" and extends to many areas where the individual's interest is not in secrecy but in personal autonomy. See, Winfield, 477 So.2d at 546; In re T.W., 551 So.2d at 1192; In re Guardianship of Browning, 568 So.2d 4, 9-12 (Fla. 1990).

The City's policy clearly violates the Florida Constitution's guarantee of privacy as set forth in article I, section 23, and the plaintiff requests that the Court enter summary judgment so holding and granting her injunctive and declaratory relief as requested in the complaint.

2. Substantive Due Process

The City's ban on hiring smokers violates Kurtz's right to substantive due process by denying her government employment opportunities on a basis unrelated to the functions of the job sought or to her ability and qualifications to carry out those job functions.

In the context of governmental hiring decisions, substantive due process requires that any standards applied in making such decisions have a rational connection with the applicant's fitness or capacity to

perform the job sought. Attaching unreasonable and arbitrary requirements to job eligibility violates substantive due process. Grusendorf v. City of Oklahoma City, 816 F.2d 539, 542 (10th Cir. 1987).

There are many instances of employment restrictions being struck down on the ground that they were not rationally related to the actual job functions. In Lindquist v. City of Coral Gables, 323 F.Supp. 1161 (S.D. Fla. 1971) the district court, applying a rational basis standard of review, held that a fire department rule prohibiting firemen from wearing sideburns extending below their earlobes bore no relationship to the proper functioning of the fire department, and violated the plaintiff's substantive due process right to determine his own personal appearance. Id. at 1163-64. In Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975), the former Fifth Circuit held that a college's rule prohibiting male teachers from wearing long hair was unconstitutional because the rule had no "relevance to legitimate administrative or educational functions." Id. at 277.

Where a government seeks to restrict employment on the basis of prior or off-duty conduct by job applicants, such restrictions must also be rationally related to the on-duty requirements of the job. Osterman v. Paulk, 387 F.Supp. 669, 670-71 (S.D. Fla. 1974).

In Osterman, the court held that a Civil Service standard prohibiting the employment of anyone who had used marijuana during the past six months was unconstitutional as applied to an applicant for a clerk position, on the ground that there was no "rational nexus" between the off-duty or prior conduct and the duties of the job in question. Id.

The court noted that under Florida Statutes section 112.011, prior criminal conduct, even a prior felony conviction, was no bar to public employment unless the crime "directly relates" to the specific job sought. Id. at 671. In relation to this, the court stated:

> The anomaly of the City's position is shown when it is recognized that a prior conviction for an unrelated felony could not bar the plaintiff's employment while a single use of marijuana within the previous six months (if established) renders her

ineligible.

Id.

In Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975), cert. dismissed, 425 U.S. 559 (1976), the former Fifth Circuit struck down a school district's practice of refusing employment to parents of illegitimate children, because the practice was not rationally related to any legitimate educational goals of the school district. Id. at 614-17.[1]

Restrictions on off-duty smoking must also be rationally related to a particular job's functions in order to pass constitutional muster, as held in Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987). In that case, a fire department's rule prohibited firefighter trainees from smoking on or off duty for one year after hiring, and required new hirees to sign an agreement to that effect as a condition of employment. Id. at 540. The court clearly recognized that the rule infringed upon protected liberty and privacy interest, stating:

> It can hardly be disputed that the Oklahoma City Fire Department's non-smoking regulation infringes upon the liberty and privacy of the firefighter trainees. The regulation reaches well beyond the work place and well beyond the hours for which they receive pay. It burdens them after their shift has ended, restricts them on weekends and vacations, in their automobiles and backyards and even, with the doors closed and the shades drawn, in the private sanctuary of their own homes.

Id. at 541.

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1 The court emphasized that it was invalidating the practice using the rational relationship test, and never reached the question of whether the practice also constituted discrimination on the basis of sex, which would have required a higher standard of review. Id. at 613, 614 & n.5.

While the Tenth Circuit acknowledged that the liberty and privacy interests at issue in the case of a no-smoking rule may not rise to the level of a fundamental right, the Court also emphasized that even non-fundamental rights are entitled to meaningful protection against governmental infringement. The court stated:

> Nor are we inclined to accept the defendants' contention that, since cigarette smoking has not been recognized as a fundamental right, no balancing test nor rationale of any kind whatsoever is needed to justify the restriction. This reasoning would seem to suggest that the state can, arbitrarily and for no reason, condition employment upon an agreement to refrain from a nearly limitless number of innocent, private and personal activities. We would be reluctant to go this far even if the law would tolerate such a venture.

Id. at 542.

In Grusendorf the court upheld the no-smoking rule, but only upon finding a "rational connection between the non-smoking regulation and the promotion of the health and safety of the firefighter trainees." The court noted that good health and physical conditioning are essential requirements for firefighters who "are frequently exposed to smoke inhalation," where "it might reasonably be feared that smoking increases this health risk." Id. at 543.

In contrast to the restriction on off-duty smoking upheld in Grusendorf, the City of North Miami's no-smoking hiring policy admittedly has no relationship to the qualifications of the applicant or the requirements of the job sought. The City's policy, in contrast, violates substantive due process by denying applicants all opportunities in government employment, for reasons unrelated to their fitness or qualifications for any particular job.

The City concedes that its policy is unrelated to job qualifications, but asserts that its goal of reducing health insurance costs justifies the policy. Even if that objective were a legitimate goal of government when it results in the turning-away of qualified applicants, the no-smoking hiring rule is not a way of "rationally" achieving that goal. If the policy were actually and rationally to serve the goal of

reducing the City's health insurance and medical costs, it would focus on its employees' health and medical histories, rather than on the fact that a job applicant engages or has engaged in one type of off-duty conduct, smoking.

Moreover, if in fact the City's policy was designed to reduce smoking-related health costs among its employees, it would forbid smoking by persons after, rather than before, they were hired. Here, a person hoping to get a job with the City must give up smoking a year in advance in the mere hope of getting a City job, and only persons who have done so are deemed worthy of employment by the municipality. However, once employed, the City does not require that a person continue to abstain from smoking. Also, those employed prior to the adoption of the no-smoking hiring policy can continue their smoking unabated, notwithstanding any additional health costs that may result. Clearly, if the City's real interest were in health costs, it would focus its regulatory activity at its actual employees rather than on creating artificial, irrational requirements for all job applicants.

Even if smoking were, in some cases, an indicant of potential health problems and increased medical costs, the rational way of addressing that issue would be in connection with the decision of whether or under what terms to provide health insurance, not in the decision of whether or not to hire in the first place. Refusing to hire smokers at all is not a rational way to achieve the goal of controlling health costs. Rather, the City could limit coverage for smoking related illnesses or require smokers to pay higher insurance premiums.

The irrational effect of this policy is that the City would deny employment even to a smoker who would not be covered under the City's group health plan, and who would thus cost the City nothing in insurance costs. For example, some job applicants may not wish or intend to join the City's health plan, because they have coverage under their spouses' group plans. The City's health-cost justification is clearly specious as applied to these individuals, and yet the City's no-smoking policy would deny these individuals employment.

Moreover, the City has admitted that it will not permit smoking employees to waive or pay an extra premium for their insurance coverage in order to obviate or defray the supposed added health care costs. In light of this admission, in particular, it is clear that the City's

no-smoking hiring policy is not really or rationally aimed at curtailing health costs. Rather, it is blatant discrimination against persons who engage in a particular conduct of which the City government disapproves.

Because the City's policy has absolutely no relation to job qualifications or functions, and no rational or logical relation to the City's interest in reducing insurance costs, it violates the plaintiff's right to substantive due process guaranteed under the Florida and United States Constitutions. U.S. Const. Amend. 14; Fla. Const. art. I, § 9. The plaintiff therefore requests that the Court enter summary judgment so holding, and granting her injunctive and declaratory relief as requested in the complaint.

3. Procedural Due Process

The City deprived Kurtz of procedural due process by barring her from all government employment opportunities based on the irrebuttable presumption that hiring Kurtz would increase the City's self-insured medical expenses. The City admits that job applicants who are smokers are not screened to determine their actual, individual health status, and are thus given no opportunity to rebut the City's presumption regarding their likely insurance risk. Procedural due process, however, requires that Kurtz be given some opportunity to rebut the correctness of that presumption in her individual case.

While an applicant for employment ordinarily does not have such a "property right" in the job applied for as to invoke the protections of procedural due process, there are certain circumstances in which a job applicant is entitled to procedural due process prior to being denied employment. One such circumstance is where governmental action not only denies an applicant a particular job, but also forecloses the applicant from seeking all other employment by the government.

In the case of Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548 (1972), the Court held that a non-tenured college teacher, with no contractual or other "property" right to renewal of his annual contract, was not entitled to a statement of reasons and a hearing prior to the state's non-renewal of his contract. Id. at 576-79, 33 L.Ed.2d at 560-62. The Court was careful to note however, that the plaintiff was

not foreclosed from seeking other employment within the state university system, and stated that if that had been the case the outcome would have been different. The Court stated:

> [T]here is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . . ." The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] . . . Due Process."

Id. at 573-74, 33 L.Ed.2d at 559 (citations omitted).

Procedural due process is denied when all opportunities for government employment are denied to a person on the basis of "an irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact." Andrews v. Drew Municipal Separate School Dist., 507 F.2d 611, 614 (5th Cir. 1975), cert. dismissed, 425 U.S. 559 (1976); see Fewquay v. Page, 682 F.Supp. 1195, 1998 (S.D. Fla. 1987), aff'd, 896 F.2d 558 (11th Cir. 1990).

In this case the plaintiff was not only denied the job of clerk-typist with the City, but she is also barred from seeking any other position within City government. The basis for the City's policy is an irrebuttable presumption that all smokers and all persons who have smoked within the twelve months are unhealthy or are poor insurance risks. The plaintiff is denied procedural due process because she has no opportunity to rebut that presumption in her case and to establish that, smoking notwithstanding, she is otherwise healthy, capable of performing her job, and does not present an unacceptable insurance risk.

The undisputed facts in this case demonstrate that the plaintiff

was denied procedural due process in violation of the 14th Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution, and the plaintiff requests that the Court enter judgment in her favor so finding, and granting her injunctive and declaratory relief.

4. Equal Protection

The City's no-smoking policy creates two discriminatory classification schemes in violation of the plaintiff's right to equal protection--

(a) The first classification scheme creates two classes of job applicants: one class consisting of applicants who use tobacco products or have used them within the preceding twelve months; and another class consisting of all other job applicants.

(b) The second classification scheme creates two classes of City employees: one class consisting of newly hired employees who are required as a condition of employment to refrain from using tobacco for at least a year; and another class consisting of persons employed by the City prior to the implementation of the policy and who are not required to change or suspend their smoking conduct in any respect in order to keep their City jobs.

The City's asserted goal in creating these classification schemes is to reduce its self-insured medical costs. Even conceding that reduction of medical costs is a legitimate goal of the City, the issue remains whether or not the classification schemes formulated by the City rationally serve that goal. Bowman v. Town of Pennsauken, 709 F.Supp. 1329, 1338-39 (D.N.J. 1989).

As stated by the former Fifth Circuit Court of Appeals, "[T]he issue is not simply whether the objective is itself legitimate, but rather whether the . . . rule 'advances that objective in a manner consistent with the Equal Protection Clause'." Andrews v. Drew Municipal Separate School District, 507 F.2d 611, 614 (5th Cir. 1975), cert. dismissed, 425 U.S. 559 (1976) (citation omitted).

a. Classification of job applicants

Classifying job applicants on the basis of smoking alone does not rationally serve the City's interest in reducing medical costs, and therefore violates the Equal Protection Clause.

The City places smokers in a category separate from all other job applicants, on the asserted basis that smokers have potential health problems and higher medical expenses. However, that category is patently underinclusive, because there are many other types of applicants besides smokers who may have more serious health problems and incur medical expenses as high as or higher than smokers.

Smokers are not per se unhealthy, but the City's classification scheme bars even healthy smokers from employment, while it does not bar others whose potential or actual health problems are just as great. For example, persons with diabetes, cancer, or AIDS would not be barred from employment by the City, even though the medical costs for persons with those diseases would almost certainly be as high as or higher than for a smoker or former smoker whose general health is good.

The City's classification scheme for job applicants is also underinclusive in that it would not bar employment of persons who engage in other kinds of conduct that may result in high medical costs. Automobile racers, IV drug users, and people who engage in high-risk sexual activity all face the prospect of health problems as a consequence of their prior or off-duty activities, but the only activity prohibited by the City is the use of tobacco.

The case of Bowman v. Town of Pennsauken, 709 F.Supp. 1329, 1338-39 (D.N.J. 1989), is analogous to the present case. In that case, a town police department imposed restrictions on officers who wished to moonlight as security guards, requiring employers of these off-duty officers to indemnify the town and limiting the hourly wages officers could make as security guards. 709 F.Supp. at 1332-33. Officers pursuing off-duty work in all fields other than security positions were not subject to the restrictions.

The court held that the restrictions created a classification scheme in which officers doing off-duty security work were treated

differently than officers doing other types of off-duty work. Id. at 1338-39. The court held that the appropriate standard of review was whether or not the restrictions bore a rational relationship to a legitimate state interest. Id. at 1339.

The court held that the township had a legitimate interest in regulating its police department, and "such goals as reducing mental and physical fatigue, limiting litigation and lessening liability insurance expenses serve as legitimate government interests supporting regulation." Id. The town's asserted rationale for imposing the restrictions only on moonlighting security guards was that the restrictions would limit the town's exposure to tort suits resulting from the officers' off-duty actions. Id.

The classification scheme set up by the town, however, did not rationally serve those legitimate goals, because the classification subject to the restrictions was "underinclusive." Id. at 1342. The court found that officers doing many types of off-duty work, such as cabdrivers, presented just as much or more of a liability risk to the township as did officers engaged in security work. Therefore, applying the restrictions only to security work was an irrational means of achieving the town's stated goal. Id. at 1343. The court stated:

> The Township, by attempting to regulate the outside employment of the police officers, has created exceptions that run counter to and destroy the underlying rationale for the Resolution. The justification offered, by the Township as a legitimate state interest is eroded, due to the exception that officers engaged in non-security work are not subject to the Resolution. . . .
>
> . . . .
>
> . . . . A police officer working as a cabdriver who witnesses an assault or theft and responds to it could present a greater insurance risk to the Township than an off-duty security officer. This illustration is only one example, but it clearly demonstrates the problem of the Resolution's classification. Therefore, the Township's asserted interest in reducing insurance costs and liability

crumbles under the actual application of the Resolution.

Id. at 1342-43. The district court in Bowman held that the restrictions on off-duty security work were clearly arbitrary and unconstitutional on their face. Id. at 1343.

Likewise in this case, the category of unhireables in which the plaintiff is placed violates equal protection both because that class is underinclusive and because it does not rationally relate to health or likely insurance risk.

b. Classification of City employees

The City's policy of requiring job applicants to give up smoking for at least a year prior to consideration, while allowing present employees to continue to smoke unabated and while allowing new employees to begin smoking once hired, is even more patently irrational. If smoking itself presents an unacceptable health risk, then there is no logical or rational basis for permitting employees to continue or begin to smoke while requiring job applicants to refrain for a year.

This classification scheme, even if it did have the actual effect of reducing overall medical costs for the City, is irrational because it is blatantly arbitrary. For example, the City could undoubtedly slash its overall medical expenses by only providing insurance coverage for persons whose names begin with the letters A through M, while denying coverage to N through Z. Such a plan, though it would certainly be an effective cost-reduction strategy, would be unconstitutional because it is arbitrary and capricious. In the same way, imposing an no-smoking requirement on some employees solely on the basis of their dates of hire is arbitrary and violative of equal protection for the persons adversely affected.

The Tenth Circuit Grusendorf case similarly involved a smoking ban on firefighter trainees but not on more senior firefighters. The court noted that this irrational and discriminatory aspect of the rule may have presented an equal protection violation, because good respiratory health (the defendant's asserted justification for the rule) is equally important for all firefighters regardless of seniority. The plaintiff in Grusendorf had not raised the equal protection issue,

however, and the court refused to rule on it sua sponte. 816 F.2d at 543. The Bowman court cited this language of the Tenth Circuit in Grusendorf. 709 F.Supp. at 1343.

In the present case, the application of the no-smoking policy to new employees but not to existing employees completely undercuts and negates the City's purported cost-saving rationale. Even if smoking indeed creates additional costs to the City, the policy of prohibiting some but not all employees from smoking is a patently arbitrary and capricious means of reducing those costs, and thus violates equal protection.

The undisputed facts in this case demonstrate that the City's classification of job applicants and employees on the basis of off-duty smoking violates equal protection. By being arbitrarily placed in a category of "unhireable" persons, the plaintiff was denied equal protection of the law, in violation of the 14th Amendment to the United States Constitution and Article I, Section 2 of the Florida Constitution. The plaintiff requests that the Court enter judgment in her favor so finding, and granting her injunctive and declaratory relief.

IV. RELIEF REQUESTED

On the basis of the undisputed material facts in this case and the legal arguments set forth above, the plaintiff requests that the Court enter a declaratory judgment, authorized by Florida Statutes section 86.011, holding that the City's policy violates the Florida Constitution and the United States Constitution.

The plaintiff also requests that the Court enter an injunction against the City's enforcement and implementation of its off-duty smoking policy. Issuance of such an injunction is authorized by Florida Statutes section 86.061 as supplemental relief based on a declaratory judgment. Insofar as the Court finds that the City's policy violates the United States Constitution, such an injunction is also authorized by title 42 United States Code section 1983.

The plaintiff also requests that the Court award her her attorneys' fees and costs incurred in this action, pursuant to 42 United States Code section 1988.

OPINION OF THE TRIAL COURT

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO. 91-3165 (04)

ARLENE KURTZ,

Plaintiff,

vs.

THE CITY OF NORTH MIAMI, FLORIDA,

Defendant.
_____/

FINAL SUMMARY JUDGMENT

Facts

The City of North Miami is a municipality in Dade County, Florida. Plaintiff, Arlene Kurtz, applied for a position as clerk typist with the City. In December, 1989, Ms. Kurtz passed a written exam for this position. Six months later, Kurtz was notified of an opening and, along with others, was invited for an interview.

On March 9, 1990 North Miami City Manager, Lawrence C. Casey, promulgated administrative regulation 1-46. (See attached exhibit 1). [App. A-1]. One objective of this regulation was to reduce the City's liability exposure. The Manager recognized that the Surgeon General of the United States has declared that the use of tobacco and tobacco products is a health hazard. The Manager further recognized that an employee's poor health increases the loss experience of group health and life insurance plans which result in increased premium costs for employees which are directly borne by the City's taxpayers. The second objective of the regulation was to reduce lost productivity time due to health related absenteeism. To meet these objectives the

Manager decreed that future job applicants must be non-users of tobacco and tobacco products for at least one year immediately preceding application for employment and must verify same by affidavit.

The regulation addresses potential hirees. It neither regulates nor attempts to regulate current employees or new non-smoking employees once they begin employment.

Arlene Kurtz appeared for her interview on May 31, 1990, and was advised that she was required to execute a non-smoking affidavit. Kurtz told the interviewer that she was a smoker and could not truthfully sign the affidavit. The interviewer told Ms. Kurtz she could continue with the interview but she would not be considered for employment until she was "smoke-free" for a one year period. The interview was discontinued.

Kurtz contends she was and is qualified for the position of clerk typist. She is willing to abide by any reasonable smoking restrictions while on the job as a condition of employment.

Plaintiff contends that the City's policy violates her rights as protected by the Fourteenth Amendment of the United States Constitution, and Article I, Sections 2, 9, and 23 of the Florida Constitution. The City responds that it's policy has a rational relationship to the objectives of the regulation.

The parties agree that no material issue of fact remains in dispute and that this matter is ripe for determination by summary judgment. The parties have submitted lengthy memoranda and numerous exhibits in support of their respective positions.

The Court has reviewed the pleadings, motions, memoranda and cases cited, and all exhibits and studies submitted, and concurs with the parties that no issue of material fact remains. Accordingly, the entry of summary judgment is warranted.

Constitutional Provisions

Article XIV, Section I of the United States Constitution provides that no State shall deprive any person of life, liberty, or property without due process of law nor shall any State deny any person

within its jurisdiction the equal protection of the laws.

Article I, Section 9 of the Florida Constitution reiterates the Federal due process clause, while Article I, Section 2 of the Florida Constitution sets forth the State's equal protection provision.

There is no specific provision in the United States Constitution addressing privacy; however, such a right is inherently recognized. In 1980, Florida adopted a privacy right as Article I, Section 23 of our Constitution. It provides that every natural person has the right to be let alone and be free from governmental intrusion into his private life.

The question presented then is whether the regulation promulgated by the North Miami City Manager violates any of the aforementioned constitutional provisions and Plaintiff's rights?

I.

Does the City's Policy Against Hiring Tobacco Users Violate a Job Applicant's Substantive Due Process Rights as Prescribed by the United States Constitution?

The first issue to address is whether the United States Constitution considers the right to use tobacco and tobacco products as a fundamental privacy or liberty right? In Carey v. Population Services Int., 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), the Supreme Court discussed fundamental privacy freedoms and enunciated that freedoms embracing personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education would be considered fundamental. Smoking was not mentioned.

In Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987), a fire fighter trainee challenged the constitutionality of a city regulation prohibiting smoking on and off duty for a period of one year after commencing employment as a fire fighter. The Court, in addressing the issue of fundamental rights, was not willing to state that smoking, under this regulation, was fundamental and protected.

Plaintiff cites Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976), a case involving a regulation governing hair

grooming for male police officers, in support of her position. While the Supreme Court utilized a rational relationship test in reaching its conclusion, it was not willing to conclude that the regulation affected a fundamental right. Kelley is not supportive of Plaintiff's position.

In Laird v. State, 342 So.2d 962 (Fla. 1977), the only Florida case addressing smoking as a fundamental right, the Supreme Court specifically found there is no fundamental right to smoke marijuana even in the privacy of one's home. The difference, of course, is that Laird addresses an illegal item - marijuana - while in the instant case, all tobacco products are involved. Laird offers no assistance in analyzing the question.

Two cases commonly cited in support of one's right to work in a chosen area as being a fundamental right are Hampton v.Mow Sun Wong, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976) and Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). While these cases relate to employment rights, more specifically, they address considerations of aliens in Hampton and free speech in Schware as affecting one's employment right. The cases do not consider the issue of employment itself as a fundamental right affected by substantive due process.

This Court concludes that the United States Constitution does not recognize the right to smoke or the right to pursue a chosen occupation as a fundamental right enjoyed by the citizens of this country. Since no fundamental right is involved, the City is not required to show a compelling state interest buy must only demonstrate a rational relationship between the regulation and that which it attempts to accomplish.

The next issue to consider then is whether there is a rational relationship between the tobacco regulation and its objective. Also, does the objective encompass a legitimate governmental interest?

Plaintiff urges this Court to narrowly interpret the rational relationship test. She argues that the dictates of Osterman v. Paulk, 387 F.Supp. 669 (S.D. Fla. 1974) should be applied. The City of Miami Civil Service Board had adopted a regulation requiring job applicants to take a polygraph exam regarding past marijuana use. The Court rejected this regulation finding there was no rational nexus between any

off-duty or prior conduct and the duties of the job in question.

In DiIulio v. Board of Fire & Police Commissioners of Northlake, 682 F.2d 666 (7th Cir. 1982), the Seventh Circuit held that there must be a rational connection between an applicant's fitness or capacity to serve in the job sought and the standards being applied. In DiIulio, a claim was made that a promotional exam was arbitrary, capricious and discriminatory and the questions on the exam were not related to any legitimate promotional scheme. The Court recognized that unreasonable and arbitrary requirements violate constitutional due process and stated there can be no arbitrary deprivation by the government of a person's liberty to engage in any occupation. The Court went on to hold, however, that a governmental body's articulated reasons for the questions showed a rational connection to the job sought and denied the applicant's challenge.

Diaz v. U.S. Postal Service, 853 F.2d 5 (1st Cir. 1988), is also on point. It reiterates the test this Court should apply. Diaz broadly defines the term "relationship" and places the burden of showing there is no rational relationship on the applicant. The applicant must shoulder the burden of showing there is no rational relation between the regulation and any legitimate governmental objective. If the applicant cannot make such a showing, her challenge fails. Again, the burden is not on the governmental authority to establish a genuine public need for the specific regulation but rather on the applicant. See also Kelley v. Johnson, supra.

In the case sub judice, the applicant has failed to carry her burden and demonstrate the absence of a rational connection between the regulation and the job. The evidence presented reflects that the objective sought by the governmental body and the method utilized are proper.

The last question relating to the substantive due process issue is whether the ends of the regulation address a legitimate governmental interest.

The item sought to be regulated herein, employment and the use of tobacco products by potential hirees, is directed to the express desire by the City Manager to reduce insurance costs to the City and ultimately to its citizens through taxes. This Court finds that the

interest addressed by the City Manager is a legitimate governmental interest. See Bowman v. Township of Pennsauken, 709 F.Supp. 1329 (D.N.J. 1989).

Based on the foregoing, this Court concludes that the policy adopted by the North Miami City Manager does not violate a job applicant's substantive due process rights.

II.

Does the City's Policy Against Hiring Tobacco Users Violate a Job Applicant's Procedural Due Process Rights as Prescribed by the United States Constitution?

In order to determine whether procedural due process requirements apply, the Court must look first to the nature of the interest at stake. It must then look to see if that interest is within the Fourteenth Amendment's protection of liberty and property. Board of Regents of State College v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have a legitimate claim of entitlement to it. Board of Regents, supra. In the instant case there is o statutorily created entitlement but merely a desire for employment. Accordingly, no property right is affected.

We must next decide if there is a liberty due process right to be considered for a particular job. The simple fact that certain procedures are made applicable does not, in and of itself, mean that these procedures acquire constitutional dimension. Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977). If the procedures take on a substantive character, constitutional guarantees may attach. If the procedures merely regulate the employment but do not permanently deprive someone of same, no liberty interest is involved and procedural due process rights are not affected. Cf. Vruno v. Schwarzwalder, 600 F.2d 124 (8th Cir. 1979).

Plaintiff relies on the cases of Fewquay v. Page, 682 F.Supp. 1195 (S.D. Fla. 1987), and Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975) to support the position that her

procedural due process rights have been violated. The distinction between Fewquay and Andrews and the instant case is clear. The individuals in those cases were permanently deprived of a right to employment due to conditions they could never overcome. In the case sub judice, Plaintiff has the absolute ability to control the condition that makes her ineligible for employment. The procedures in the instant case merely regulate and do not permanently deprive Plaintiff of the ability to be employed. Therefore, this Court concludes that since no property or liberty interest is involved, Plaintiff's procedural due process rights have not been affected.

III.
Are Plaintiff's Equal Protection Rights
Violated Under Either the United States
Or Florida Constitutions?

Plaintiff argues that the City's "tobacco-in-hiring" policy creates two distinct classes thereby violating the equal protection provisions of both the United States and Florida Constitutions. Plaintiff's position is without merit.

The equal protection clause of the Fourteenth Amendment does not require that a state choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the state's action be rationally based and free from invidious discrimination. Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

In State v. Peters, 534 So.2d 760 (Fla. 3rd D.C.A. 1988), a case involving a pit bull ordinance, an argument was made that all dog owners were not being treated equally in violation of constitutional guarantees. It is well established that a law is not constitutionally defective simply because it contains classifications which are underinclusive. A governmental entity is not bound to deal alike with all classes or to strike at all evils at the same time or in the same manner. Dandridge, supra.

Since the City's policy only regulates applicants for employment as it concerns their use of tobacco products, plaintiff would be hard pressed to contend the class is overinclusive. She may contend it is underinclusive; however, her argument that such a class violates equal

protection is erroneous. Plaintiff's equal protection rights have not been violated. The City's stated rationale for treating tobacco users differently is valid.

IV.
Does Article I Section 23 of the Florida Constitution - Right to Privacy - Apply to the Instant Case?

Every natural person has the right to be let alone and free from governmental intrusion into his private life. This constitutional provision guaranteeing one's right to privacy was not intended to provide an absolute guarantee against all governmental intrusion into the private lives of individuals. Fla. Bd. of Bar Examiners Re: Applicant, 443 So.2d 71 (Fla. 1983); Stall v. State, 570 So.2d 257 (Fla. 1990).

The right to privacy is a fundamental right - one which demands application of a compelling state interest standard. This test places the burden on the state to justify any intrusion on privacy. This burden can be met by demonstrating that the challenged provision serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985). However, before the right to privacy attaches and the compelling state interest test need be applied, there must be a reasonable expectation of privacy. State v. Long, 544 So.2d 219 (Fla. 2nd D.C.A. 1989); Shaktman v. State, 553 So.2d 148 (Fla. 1989).

Plaintiff's analysis of this issue frames a question very narrow in scope. She argues she has a right to smoke in her own home. This Court agrees. So long as she does not smoke marijuana or any other illegal substance, she does. Laird, supra.

The issue presented by Plaintiff, however, is not the one that must be addressed. The question is whether a governmental entity may regulate employment. This question is not answered by resort to one's right to privacy. There is not expectation of privacy in employment. Accordingly, this Court rejects Plaintiff's reliance on Article I, Section 23 of the Florida Constitution.

V.

Does the Florida Clean Indoor Air Act Preempt Municipalities From Enacting Rules Encompassing Smoking?

While the Florida Clean Indoor Air Act regulates smoking and preempts this area to the state, the regulation as adopted by the City does not interfere with this Act. This Court, after analysis, concludes that the Clean Indoor Air Act is inapplicable to the instant case.

VI.

The Court has reviewed the rest of the issues raised by the parties and concludes that none need be specifically addressed. With due respect to both parties, no merit exists with these issues.

Conclusion

Based on the foregoing analysis of the issues presented, this Court concludes that the regulation adopted by the North Miami City Manager was a proper regulation adopted for a valid purpose. The regulation does not violate any provision of either the United States or Florida Constitutions.

No issue of material fact remains to be decided. The facts and law convince this Court that Defendant's Motion for Summary Judgment should be granted and the Plaintiff's Motion for Summary Judgment should be denied. Accordingly, Final Summary Judgment be and the same is hereby entered in favor of Defendant and against the Plaintiff.

The Court retains jurisdiction of this matter to consider the issue of costs.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 21st day of August, 1992.

/S/
SIDNEY B. SHAPIRO
CIRCUIT COURT JUDGE

OPINION OF THE FLORIDA SUPREME COURT

SUPREME COURT OF FLORIDA

No. 82,836

THE CITY OF NORTH MIAMI,

Petitioner,

vs.

ARLENE KURTZ,

Respondent.

_____/

April 20, 1995

OVERTON, J.

We have for review Kurtz v. City of North Miami, 625 So.2d 899 (Fla. 3d DCA 1993). After the district court issued that decision, it certified, in a separate order, the following question as one of great public importance: DOES ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION PROHIBIT A MUNICIPALITY FROM REQUIRING JOB APPLICANTS TO REFRAIN FROM USING TOBACCO OR TOBACCO PRODUCTS FOR ONE YEAR BEFORE APPLYING FOR, AND AS A CONDITION FOR BEING CONSIDERED FOR EMPLOYMENT, EVEN WHERE THE USE OF TOBACCO IS NOT RELATED TO JOB FUNCTION IN THE POSITION SOUGHT BY THE APPLICANT? This question involves the issue of whether applicants seeking government employment have a reasonable expectation of privacy under article I, section 23, as to their smoking habits.[1] We have jurisdiction. Art. I, s 3(b)(4), Fla.

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1 Notably, because Florida's constitutional privacy provision applies only to government action, the provision would not be implicated if a job applicant was applying for a position with a private employer.

Const. For the reasons expressed, we answer the certified question in the negative, finding that Florida's constitutional privacy provision does not afford Arlene Kurtz, the job applicant in this case, protection under the circumstances presented.

The record establishes the following unrefuted facts. To reduce costs and to increase productivity, the City of North Miami adopted an employment policy designed to reduce the number of employees who smoke tobacco. In accordance with that policy decision, the City issued Administrative Regulation 1-46, which requires all job applicants to sign an affidavit stating that they have not used tobacco or tobacco products for at least one year immediately preceding their application for employment. The intent of the regulation is to gradually reduce the number of smokers in the City's work force by means of natural attrition. Consequently, the regulation only applies to job applicants and does not affect current employees. Once an applicant has been hired, the applicant is free to start or resume smoking at any time. Evidence in the record, however, reflects that a high percentage of smokers who have adhered to the one year cessation requirement are unlikely to resume smoking.

Additional evidence submitted by the City indicates that each smoking employee costs the City as much as $4,611 per year in 1981 dollars over what it incurs for non-smoking employees. The City is a self-insurer and its taxpayers pay for 100% of its employees' medical expenses. In enacting the regulation, the City made a policy decision to reduce costs and increase productivity by eventually eliminating a substantial number of smokers from its work force. Evidence presented to the trial court indicated that the regulation would accomplish these goals.

The respondent in this case, Arlene Kurtz, applied for a clerk-typist position with the City. When she was interviewed for the position, she was informed of Regulation 1-46. She told the interviewer that she was a smoker and could not truthfully sign an affidavit to comply with the regulation. The interviewer then informed Kurtz that she would not be considered for employment until she was smoke-free for one year. Thereafter, Kurtz filed this action seeking to enjoin enforcement of the regulation and asking for a declaratory judgment finding the regulation to be unconstitutional.

In ruling on a motion for summary judgment, the trial judge recognized that Kurtz has a fundamental right of privacy under article I, section 23, of the Florida Constitution. The trial judge noted that Kurtz had presented the issue in the narrow context of whether she has a right to smoke in her own home. While he agreed that such a right existed, he concluded that the true issue to be decided was whether the City, as a governmental entity, could regulate smoking through employment. Because he found that there is no expectation of privacy in employment and that the regulation did not violate any provision of either the Florida or the federal constitutions, summary judgment was granted in favor of the City.

The Third District Court of Appeal reversed. The district court first determined that Kurtz' privacy rights are involved when the City requires her to refrain from smoking for a year prior to being considered to employment. The district court then found that, although the City does have an interest in saving taxpayers money by decreasing insurance costs and increasing productivity, such interest is insufficient to outweigh the intrusion into Kurtz' right of privacy and has no relevance to the performance of the duties involved with a clerk-typist. Consequently, the district court concluded that the regulation violated Kurtz's privacy rights under article I, section 23, of the Florida Constitution. We disagree.

Florida's constitutional privacy provision, which is contained in article I, section 23, provides as follows: Right of privacy.--Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law. This right to privacy protects Florida's citizens from the government's uninvited observation of or interference in those areas that fall within the ambit of the zone of privacy afforded under this provision. Shaktman v. State, 553 So.2d 148 (Fla.1989). Unlike the implicit privacy right of the federal constitution, Florida's privacy provision is, in and of itself, a fundamental one that, once implicated, demands evaluation under a compelling state interest standard. Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla.1985). The federal privacy provision, on the other hand, extends only to such fundamental interests as marriage, procreation, contraception, family relationships, and the rearing and educating of children. Carey v. Population Serv. Int'l, 431 U.S. 678, 97

Although Florida's privacy right provides greater protection than the federal constitution, it was not intended to be a guarantee against all intrusion into the life of an individual. Florida Bd. of Bar Examiners re Applicant, 443 So.2d 71 (Fla.1983). First, the privacy provision applies only to government action, and the right provided under that provision is circumscribed and limited by the circumstances in which it is asserted. Id. Further, "[d]etermining 'whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation.' " Stall v. State, 570 So.2d 257, 260 (Fla.1990) (alteration in original) (quoting Shaktman, 553 So.2d at 153 (Fla.1989) (Ehrlich, C.J., concurring)), cert. denied, 501 U.S. 1250, 111 S.Ct. 2888, 115 L.Ed.2d 1054 (1991). Thus, to determine whether Kurtz, as a job applicant, is entitled to protection under article I, section 23, we must first determine whether a governmental entity is intruding into an aspect of Kurtz's life in which she as a "legitimate expectation of privacy." If we find in the affirmative, we must then look to whether a compelling interest exists to justify that intrusion and, if so, whether the least intrusive means is being used to accomplish the goal.

In this case, we find that the City's action does not intrude into an aspect of Kurtz' life in which she has a legitimate expectation of privacy. In today's society, smokers are constantly required to reveal whether they smoke. When individuals are seated in a restaurant, they are asked whether they want a table in a smoking or non-smoking section. When individuals rent hotel or motel rooms, they are asked if they smoke so that management may ensure that certain rooms remain free from the smell of smoke odors. Likewise, when individuals rent cars, they are asked if they smoke so that rental agencies can make proper accommodations to maintain vehicles for non-smokers. Further, employers generally provide smoke-free areas for non-smokers, and employees are often prohibited from smoking in certain areas. Given that individuals must reveal whether they smoke in almost every aspect of life in today's society, we conclude that individuals have no reasonable expectation of privacy in the disclosure of that information when applying for a government job and, consequently, that Florida's right of privacy is not implicated under these unique circumstances.

In reaching the conclusion that the right to privacy is not implicated in this case, however, we emphasize that our holding is limited to the narrow issue presented. Notably, we are not addressing the issue of whether an applicant, once hired, could be compelled by a government agency to stop smoking. Equally as important, neither are we holding today that a governmental entity can ask any type of information it chooses of prospective job applicants.

Having determined that Kurtz has no legitimate expectation of privacy in revealing that she is a smoker under the Florida constitution, we turn now to her claim that the regulation violates her rights under the federal constitution. As noted, the federal constitution's implicit privacy provision extends only to such fundamental interests as marriage, procreation, contraception, family relationships, and the rearing and educating of children. Carey. Clearly, the "right to smoke" is not included within the penumbra of fundamental rights protected under that provision. Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir.1987) (the act of smoking a cigarette does not rise to the level of a fundamental right). Moreover, even if we were to find that some protected interest under the federal constitution were implicated so as to require a rational basis for the regulation we would still find the regulation to be constitutional. Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976) (when assuming a liberty interest exists in an employment regulation, regulation must be reviewed under a rational basis test). As acknowledged by the district court, the City has a legitimate interest in attempting to reduce health insurance costs and to increase productivity. On these facts, the City's policy cannot be deemed so irrational that it may be branded arbitrary. Kelley. In fact, under the special circumstances supported by the record in this case, we would find that the City has established a compelling interest to support implementation of the regulation. As previously indicated, the record reflects that each smoking employee costs the City as much as $4,611 per year in 1981 dollars over what it incurs for non-smoking employees; that, of smokers who have adhered to the one year cessation requirement, a high percentage are unlikely to resume smoking; and that the City is a self-insurer who pays 100% of its employees' medical expenses. We find that the elimination of these costs, when considered in combination with the other special circumstances of this case, validates a compelling interest in the City's policy of gradually eliminating smokers from its work force. We also find that the City is using the least intrusive means in accomplishing this compelling interest

because the regulation does not prevent current employees from smoking, it does not affect the present health care benefits of employees, and it gradually reduces the number of smokers through attrition. Thus, we find the regulation to be constitutional under both the federal and Florida constitutions.

For the reasons expressed, we answer the question in the negative, finding that Florida's constitutional privacy provision does not afford the applicant, Arlene Kurtz, protection because she has no reasonable expectation of privacy under the circumstances of this case. Accordingly, we quash the district court's decision, and we remand this case with directions that the district court of appeal affirm the trial court judgment.

It is so ordered.

GRIMES, C.J., and HARDING, WELLS and ANSTEAD, JJ., concur.

KOGAN, J., dissents with an opinion, in which SHAW, J., concurs.

KOGAN, Justice, dissenting.

As the majority itself notes, job applicants are free to return to tobacco use once hired. I believe this concession reveals the anti-smoking policy to be rather more of a speculative pretense than a rational governmental policy. Therefore I would find it unconstitutional under the right of due process. See Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla.1991).

The privacy issue is more troublesome, to my mind. There is a "slippery- slope" problem here because, if governmental employers can inquire too extensively into off-job-site behavior, a point eventually will be reached at which the right of privacy under article I, section 23 clearly will be breached. An obvious example would be an inquiry into the lawful sexual behavior of job applicants in an effort to identify those with the "most desirable" lifestyles. Such an effort easily could become the pretext for a constitutional violation. The time has not yet fully passed, for example, when women job applicants have been questioned about their plans for procreation in an effort to eliminate those who

may be absent on family leave. I cannot conceive that such an act is anything other than a violation of the right of privacy when done by a governmental unit.

Health-based concerns like those expressed by the City also present a definite slippery slope to the courts. The time is fast approaching, for example, when human beings can be genetically tested so thoroughly that susceptibility to particular diseases can be identified years in advance. To my mind, any governmental effort to identify those who might eventually suffer from cancer or heart disease, for instance, itself is a violation of bodily integrity guaranteed by article I, section 23. Moreover, I cannot help but note that any such effort comes perilously close to the discredited practice of eugenics.

The use of tobacco products is more troubling, however. While legal, tobacco use nevertheless is an activity increasingly regulated by the law. If the federal government, for instance, chose to regulate tobacco as a controlled substance, I have no trouble saying that this act alone does not undermine anyone's privacy right. However, regulation is not the issue here because tobacco use today remains legal. The sole question is whether the government may inquire into off-job-site behavior that is legal, however unhealthy it might be. In light of the inherently poor fit between the governmental objective and the ends actually achieved, I am more inclined to agree with the district court that the right of privacy has been violated here. I might reach a different result if the objective were better served by the means chosen.

SHAW, J., concurs.

ORDER DENYING MOTION FOR REHEARING

SUPREME COURT OF FLORIDA

Wednesday, July 5, 1995

CASE NO. 82,836

THE CITY OF NORTH MIAMI, FLORIDA,

Petitioner,

v.

ARLENE KURTZ,

Respondent.

_____/

Respondent's Motion for Rehearing filed in the above cause is hereby denied.

GRIMES, C.J., OVERTON, HARDING, WELLS and ANSTEAD, JJ., concur
SHAW and KOGAN, JJ., dissent

Sid J. White
Clerk, Supreme Court

(2)

Supreme Court, U.S.
FILED
DEC 4 1995
CLERK

No. 95-545

In The

Supreme Court of the United States

October Term, 1995

ARLENE KURTZ,

Petitioner,

vs.

CITY OF NORTH MIAMI, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari From The Florida Supreme Court

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QUESTIONS PRESENTED

I. Should the Court consider a constitutional question which was not raised in the state supreme court below?

II. Should the Court consider whether the Due Process Clause of the Fourteenth Amendment prohibits a state or local government from deciding not to hire tobacco users as public employees where Petitioner conceded that a workforce containing fewer tobacco-users is more productive and less costly, regardless of particular job function, and where the record evidence is overwhelming, undisputed and unrebutted that the City of North Miami's employment policy is legitimate and rational in every respect?

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JURISDICTION

The jurisdiction of this Court has erroneously been invoked under 28 U.S.C. § 1254(1). The Court arguably has discretionary jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner claims this case arises under the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

As will be shown below, there is no plausible federal constitutional issue raised by the petition in this case. The United States Constitution does not forbid governments, when deciding whom to employ as public servants, from rationally taking into account the real and substantial additional costs of employing tobacco-users. Moreover, the abstract constitutional question posed by Ms. Kurtz (in essence: "Does the Fourteenth Amendment bar discrimination against tobacco-users?") was never raised, presented or argued in the Florida Supreme Court below. Moreover, Kurtz neglected to introduce at trial **one scintilla of evidence** challenging the legitimacy or rationality of the City's regulation, and **did not even dispute** the City's overwhelming proof of legitimacy and rationality.

To lure this Court into considering whether local communities ought to be precluded by "substantive due process" considerations from rationally taking tobacco-use into account when deciding whom to employ as

public servants, Kurtz has misstated the record facts, the procedural history of this case, and even the court rulings below. As shown below, the only *bona fide* issues presented by this case relate to Florida appellate procedures and Petitioner's failure to carry her evidentiary burden in the trial court, issues which present no important or novel issue for Supreme Court consideration.

The City of North Miami is self-insured and its taxpayers pay for **all** the medical expenses of its employees. In 1990, the City adopted a policy of not hiring individuals who used tobacco in the 12-month period preceding their application. The policy only requires job applicants to certify that they have not smoked for the preceding year and does not affect current employees or even new employees who might later begin to smoke after their employment; the policy seeks only to gradually reduce the number of smokers in the public workforce by means of natural attrition. The policy was grounded on overwhelming, unrebutted and undisputed empirical evidence, some of which is cited in the Regulation itself, that reducing the number of smokers in the workforce will in fact save millions of public tax dollars which otherwise will be needlessly wasted on the self-inflicted illnesses of smokers and the cost of their overall higher absenteeism and lower productivity.

Ms. Kurtz sued to enjoin the City's policy on various Federal and State constitutional grounds. After many hearings over many months, and the careful consideration of the City's voluminous evidentiary showing of legitimacy and rationality (**Ms. Kurtz having submitted no evidence to the contrary**), the State trial judge held the City's policy to be reasonable and constitutional in all respects.

A. The Only Issue Before The Florida Supreme Court Was A State-Law Certified Question.

After the circuit court sustained the City's policy, Kurtz appealed to the district court of appeal, Florida's intermediate appellate court. The district court erroneously ruled that the City's policy violated the **Florida Privacy Amendment,** Article I, Section 23 of the Florida Constitution, because the City had failed to prove a "compelling need" for its policy. The district court explicitly stated that it was not considering or deciding any federal issue. *Kurtz v. City of North Miami*, 625 So. 2d 899, 901 (Fla. 3d DCA 1993), *quashed*, 653 So. 2d 1025 (Fla. 1995). After rendering its decision solely on the state-law issue, the district court certified its state-law ruling to the Florida Supreme Court for review pursuant to the latter's "certified question" jurisdiction under Article V, Section 3(b)(4), Fla. Const., and Florida Appellate Rule 9.030(a)(2)(A)(V), which allowed the Florida Supreme Court to review the "question certified" by the district court. **The "question certified" was solely the state-law issue decided by the district court, namely whether Article I, Section 23 of the Florida Constitution barred the City's employment policy.**[1]

Accordingly, as the Supreme Court of Florida emphasized in its opinion, the **only** question before it was the

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[1] Petitioner has violated Supreme Court Rule 14 by failing to provide this Court with the district court's opinion or its certification order. The City has included the certification order in its Appendix at App. 1; the district court's opinion is reported at 625 So. 2d 899.

state privacy law question decided and certified by the Third District, to wit:

> Whether applicants seeking government employment have a reasonable expectation of privacy under article I, section 23, as to their smoking habits.

(Petitioner's Appendix at A-35). The Florida Supreme Court proceeded to answer **that** state law question:

> For the reasons expressed, we answer the certified question in the negative, **finding that Florida's constitutional privacy provision does not** afford Arlene Kurtz, the job applicant in this case, protection under the circumstances presented.

(Petitioner's Appendix at A-36; emphasis supplied). To ensure that no one misconstrued its limited state-law ruling, the Florida Supreme Court *reiterated* that its ruling was limited to the narrow state-law question presented: "In reaching the conclusion that the right to privacy is not implicated in this case, however, we emphasize that our holding is limited to the narrow issue presented." (Petitioner's Appendix at A-39).

Kurtz did not argue to the Florida Supreme Court that the City's policy violated the Due Process Clause, or the Fourteenth Amendment, or even the United States Constitution generally. Neither Kurtz nor the City briefed any issue except the state-law issue described in the district court's certified question, which was the only issue decided by the Third District and the only issue before the Florida Supreme Court. Indeed, the City's initial and reply briefs to the Florida Supreme Court

specifically noted that no federal constitutional issue was before the court.[2]

Because the only issue presented to the Florida Supreme Court was the state-law issue decided and certified by the district court, and because neither party addressed any federal issue, this Court should deny Kurtz's petition. *See Illinois v. Gates*, 462 U.S. 212 (1983) (declining to address a question not presented to the Illinois Supreme Court); *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 (1981) (refusing to consider a similar due process argument which the petitioner had not presented to the appellate court below); *Webb v. Webb*, 451 U.S. 493 (1981) (dismissing a writ for want of jurisdiction because the federal question had not been advanced in the briefs to the Georgia Supreme Court, or in the rehearing motion therein); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) (refusing to consider an issue not raised in the party's

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[2] Initial Brief at 49; Reply Brief at 10-11. Kurtz's brief to the Florida Supreme Court specifically stated that the issue presented for review was whether Article I, Section 23 of the Florida Constitution barred the City's policy (Kurtz Brief at p. 1); she argued **only** that the City's policy violated Article I, Section 23. Kurtz **never** argued that the City policy violated the Fourteenth Amendment; neither the Fourteenth Amendment nor the Due Process Clause is **even cited** in her table of citations. (Relevant portions of the parties' Florida Supreme Court briefs are included in Respondent's Appendix at App. 3-43.) Nor did Kurtz, pursuant to Florida Appellate Rule 9.330, suggest that the district court had **overlooked** a Fourteenth Amendment issue; nor did Kurtz request the district court to certify a federal-law issue to the Florida Supreme Court pursuant to Appellate Rule 9.030(a)(2)(A)(V); nor did Kurtz ask the Florida Supreme Court to **consider** any Fourteenth Amendment non-certified non-issue.

brief to the appellate court below); *A. Dickes v. Kress & Co.*, 398 U.S. 144, 147 (1970) (declining to consider an issue not raised in the appellate court below); *McGoldrick v. Compagnie Generale*, 309 U.S. 430 (1940) (refusing to consider a constitutional argument not presented to the New York Court of Appeals); and *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937) (emphasis supplied):

> Before we may undertake to review a decision . . . it must appear affirmatively from the record, not only that the federal question **was presented for decision to the highest court of the State** having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54, and cases there cited.

Finally, the Florida Supreme Court did not "decide" a question of federal constitutional law, and certainly not a question of due process, which term is not even mentioned in its opinion.[3]

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[3] The Florida Supreme Court's reference to the federal "implicit privacy" doctrine – not Due Process – was pure *obiter dictum* wholly unnecessary to the court's determination of the state-law privacy question presented. *See Coastal Petroleum v. American Cyanamid*, 492 So. 2d 339, 344 (Fla. 1986), *cert. denied*, 479 U.S. 1065 (1987); *Ciongoli v. State*, 337 So. 2d 780 (Fla. 1976); *State ex rel. Biscayne Kennel Club v. Board of Business Reg.*, 276 So. 2d 823-826 (Fla. 1973); *Hart v. Stribling*, 6 So. 455, 456 (Fla. 1889) (Florida Supreme Court dictum on an issue "not then before the court" is a "gratuitous impertinence," which, "whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it.") *See also Street v. New York*, 394 U.S. 576, 581-582 (1969) (a federal question must be both presented to and "necessarily decided" by the State's highest court); and *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945) (record must reflect that federal issue was raised and decided by State's highest court). For an

That the Florida Supreme Court **did not decide** any federal (non)issue, much less a federal due process (non)issue, is proved by the fact that after the Florida Supreme Court rendered its decision, Kurtz filed a lengthy (19-page) motion for rehearing – nearly twice as long as her Petition to this Court – which described everything Kurtz considered wrong with the court's opinion **yet did not once mention, cite or even elliptically refer to the Due Process Clause, the Fourteenth Amendment, the United States Constitution, nor to a single decision by this Court.** On the contrary, the 19-page rehearing motion argued only that the court had misconstrued Article I, Section 23 of the Florida Constitution, which is cited at least 25 times in her motion.[4] *See Beck v. Washington*, 369 U.S. 541, 553 (1961), where the Court refused to entertain an argument not made in the Petitioner's rehearing motion to the state supreme court; and *Webb v. Webb, supra*, to the same effect.

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illustration of this Court's treatment of such *obiter dictum, see Myers v. United States*, 272 U.S. 52, 141-142 (1926), describing as *dictum* Chief Justice Marshall's remarks in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), regarding presidential removal power, because it addressed matters not actually presented to the Court ("The question . . . was not argued to the Court by any counsel. . . . " *Id.* at 141).

[4] "In holding that the privacy protection in Article I, Section 23 applies only to . . . "; "In construing the reach of Article I, Section 23 . . . "; "The court misconstrued Article I, Section 23 . . . "; "Article I, Section 23 itself reveals . . . "; "Article I, Section 23 must extend to more . . . "; "The court's overly restrictive reading of Article I, Section 23 in this case. . . . " "The court has misapprehended the proper scope of the protection afforded by Article I, Section 23," etc.

Accordingly, the Florida Supreme Court decided only a state-law issue certified to it by the district court, and its passing comment about federal "implicit privacy" protection was (a) *obiter dictum*, a mere "make-weight" reference to an **analogous** federal doctrine; (b) dictum which addressed a matter which had not been decided by the district court and which had not been described in the certified question to the court; and (c) dictum on a non-issue which was not before the court and not argued or briefed by either party.

B. Kurtz's Portrayal Of The Factual And Procedural Predicate Of This Case Is Profoundly Inaccurate: In Fact The City Proved Through Undisputed And Overwhelming Evidence, Which Was Conceded By Kurtz, That Its Policy Was Both Legitimate And Rational, While Kurtz Proved Nothing At All.

Nearly all of the important "factual" statements in Kurtz's petition are either untrue or misleading, just as they were when Kurtz made the same misstatements to the Florida Supreme Court.[5]

In fact, the City submitted to the circuit court detailed and comprehensive affidavits and exhibits including multiple volumes – literally **thousands of pages** – of medical, economic and scientific data which **conclusively proved** that its policy was utterly rational

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[5] Because the very same misstatements were made to the Florida Supreme Court, the City includes in its Appendix, at App. 2-22 and 30-41, the pertinent sections of the City's Florida Supreme Court briefs providing the full record citations which refute Kurtz's distortions.

and would in fact promote legitimate – even "compelling" according to the Florida Supreme Court – public and governmental objectives. That empirical evidence was so overwhelming and conclusive that Kurtz did not even attempt a "pro forma" rebuttal: Kurtz submitted **no evidence whatever** to contradict the City's evidence, and responded by informing the circuit court that the evidence was all "immaterial," "irrelevant," and "undisputed." Kurtz's attorney argued that the circuit court should rule in her favor merely on the basis of abstract theory, without regard to the overwhelming evidence of rationality. **Kurtz thus "tried" her case solely on the basis of her attorney's argument that the City's policy was unconstitutional because she – Kurtz's attorney – could hypothesize supposedly better means of achieving the City's goals.**[6]

The City's evidence of rationality was so overwhelming and conclusive, in fact, that Kurtz **did not even depose** the City's expert witness whose lengthy and detailed affidavit concerning the critical medical and economic data supported the City's policy and was one of

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[6] Kurtz's attorney asserted to the trial court (and to every court thereafter) that the City's policy was "irrational" *because* the City had failed to adopt a similar policy aimed at Twinkie-eating skydivers; or because it would have been better for the City to impose a health insurance surcharge on smoking employees. *See, e.g.*, Kurtz's motion for summary judgment at pp. 13, 18, asserting (without evidentiary support) that it would be more rational for the City to deny smokers health insurance altogether, and that the City's policy was underinclusive in not addressing the hazards of automobile racing. However, Kurtz never submitted **evidence** in support of *any* claimed deficiencies in the City's policy.

the cornerstones of the City's evidentiary submission; nor did she depose any of the City officials who had been identified as the knowledgeable witnesses with respect to the City's employment and insurance practices. **Moreover, Kurtz did not submit any testimony or evidence of her own to oppose, challenge or contradict either the testimony of the City's witnesses or the multiple volumes of medical and economic data submitted by the City and cited by its expert, which evidence the trial judge spent months reviewing before ruling that the City's policy was, in fact, both legitimate and rational.**[7]

The trial court's ruling contained specific findings of fact based on its exhaustive review of the undisputed and unopposed evidence, and those findings of fact were not questioned by either of the appellate courts which reviewed the ruling and the undisputed evidence which supported it. The Florida Supreme Court even went so far as to remark that the City had actually proved ("under the special circumstances supported by the record in this case"; 653 So. 2d at 1028) a **compelling** justification for its

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[7] The City would have very much liked to have included in its Appendix some of the empirical evidence contained in the thousands of pages of scientific studies and detailed graphs and tables which proved beyond peradventure that the City's policy was rational. Unfortunately, it would be prohibitively costly to typeset those detailed evidentiary materials in accordance with the Supreme Court's Rules. However, the City has included in its Appendix, at App. 42-59, the title references to the research and data relied on by the City's expert witness and submitted to the trial court. The City's statement of the facts in its Florida Supreme Court brief (App. 6-21) also summarizes the salient facts proved by that undisputed record evidence.

policy, because the undisputed evidence was so overwhelming.

It would be profoundly unfair for Kurtz to be permitted now, three appellate courts removed from the evidentiary stage of the proceeding, to argue that the City's policy was "irrational" even though she failed to introduce **any evidence** to challenge the rationality of the policy. Had Kurtz identified in the trial court *any* factual disputes or uncertainties, the City and the trial court could have addressed and resolved them. However, it was *Kurtz* who challenged the policy and thus had the burden to prove that it was irrational, and it was **Kurtz** who abdicated that responsibility.[8]

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[8] Kurtz always conceded the legitimacy of the City's policy and only labeled the policy "irrational" in the special (and legally-spurious) sense that her attorney claimed that better alternatives could have been devised. She also conceded she had no constitutionally-protected right to a job with the City nor any constitutional rights as a tobacco-user. These concessions appear in virtually every Kurtz pleading and brief and in the transcripts of virtually every court hearing below. See, for example, July 25, 1991 hearing transcript (pp. 4, 24), April 8, 1991 hearing transcript (p. 6), July 8, 1991 transcript (pp. 20-21, 23), and December 6, 1991 transcript (p. 20), conceding that smoking affected employee productivity, that it was a proper goal for the City to keep its health insurance costs as low as possible, and "there are many legitimate means it could use to reach that goal." See also Kurtz's trial memorandum of May 8, 1991 (p. 5), conceding the legitimacy of the City's objectives; Kurtz's trial memorandum of April 8, 1991 (pp. 4-5, 40-41, 46-48), asserting that the City's policy was unconstitutional because there were (she claimed) less intrusive means to achieve the City's objectives. See also January 7, 1992 transcript (pp. 20-23), again conceding the legitimacy of the City's policy, and arguing that the policy should be struck down because

There are other glaring misstatements in Kurtz's petition which must be pointed out:

1. The district court did not question the trial court's ruling with respect to the legitimacy of the City's policy (which was unchallenged), and only held (erroneously) that the policy violated the Florida Privacy Amendment because the City had not proved a **compelling** need for the policy.

2. It is not true that the City's "sole asserted justification" for its policy was cost reduction. Though reducing the City's direct costs and expenditures was indeed a main objective, the City also submitted volumes of evidence concerning its interests in promoting worker productivity, reducing absenteeism, and promoting crucial local, State and National public health objectives.

3. The City's policy does not exclude from employment any person who has used tobacco. The policy only

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"they are excluding smokers today, tomorrow they are going to be excluding donut eaters" and "it's part of the analysis . . . in determining the rationality . . . to see if there are other groups who may impose similar risks to the city and whether they're being treated similarly or differently." *Id.* at 23. See also transcript of November 25, 1991 hearing (p. 14), wherein Kurtz's attorney stipulated that she was not claiming any property right to a City job. See also Kurtz's brief to the district court (p. 30), conceding that she had no right to a job with the City. To the same effect, see Kurtz's brief to the Florida Supreme Court (pp. 4, 16 and 20) conceding that Kurtz did not claim "a constitutional right to smoke" and specifically declaring that she was not claiming either a "right to smoke" or a "right to a City job."

excludes persons who used tobacco during the year preceding their application, and the City submitted unopposed and uncontradicted evidence supporting the rationality of that "one year cessation" requirement.

4. Kurtz's job interview was not "terminated." Kurtz formally withdrew her application for employment and never reapplied and her lawsuit did not even seek employment or a re-interview with the City. Thus when Kurtz states the City had no knowledge of her actual health condition, she neglects to reveal that the City could not possibly have such information in view of Kurtz's withdrawal of her application for employment.

5. There is **no evidence** in the record to support Kurtz's statement that the policy will or even **might** cause the City to hire a "less qualified nonsmoker" over a "more qualified smoker." That statement is pure fabrication. In fact, Kurtz stipulated that the policy did not have that effect, and the only evidence with respect to the relative "qualifications" of applicants is the undisputed evidence that a more qualified non-smoking applicant was hired instead of the poorly qualified Kurtz, who stipulated that she would not have been hired even aside from her smoking.[9]

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[9] Kurtz never introduced any evidence or testimony to show that less qualified applicants had or might be hired over more qualified applicants as a result of the City policy. Quite the contrary: At trial Kurtz conceded that she would not get the job she applied for because of the large number of "other more qualified candidates." See May 8, 1991 hearing transcript (pp. 39-40). In Kurtz's brief to the Third District she conceded at page 11 that the City has had as many as 500 applicants for a single job opening, a fact which plainly refutes her unsupported

6. Kurtz's statement that the City "does not give smokers the option of paying for any increased insurance costs that may result from their smoking" is another perennial canard, for the actual evidence is that City employees do not pay **any costs** relating to insurance or medical treatment, because the City is 100 percent self-insured and pays 100 percent of all of its employees' health care expenses; furthermore, the City cannot implement a policy of charging some employees "increased insurance costs" even if it wished to do so which it does not.[10]

7. Also erroneous is Kurtz's statement that the City did not "investigate actual health costs or productivity data" to justify its regulation. The City's briefs to the Florida Supreme Court demonstrate why that statement is both wrong and ridiculous. The record reflects that the City's policy was based on actual scientific data (**as the policy itself reflects**), which evidence Kurtz neither disputed nor opposed.[11]

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assertion that less qualified nonsmokers have been or would be hired over more qualified smokers.

[10] Even disregarding the fact that courts do not strike down a rational policy because "better" policies could be hypothesized, Kurtz did not introduce **a single molecule of evidence** supporting her attorney's unsubstantiated claim that it would be "better" or "fairer" or "less intrusive" to adopt a less generous or more discriminatory insurance program. Kurtz had the burden to prove that the City's actual policy was **irrational** – not that it was arguably inferior to other policies – and she did not carry that burden.

[11] In any event, the City's policy could have been based on merely rational assumptions without the City conducting scientific studies to determine its "actual health costs or productivity data." *See FCC v. Beach Communications*, 113 S. Ct. 2096 (1993).

8. It is completely untrue (and a perennial Kurtz misstatement) that the City's expert witness stated that each smoking employee costs the City an additional $349 to $435 per year, and that "from 57 to over 90 percent" of these costs would be eliminated by prohibiting smoking on the job. On the contrary, the City **actually proved** that the policy will save the City upwards of $4,611 per employee per year, and even that direct savings ignores the larger public health benefits. If Kurtz wished to challenge that evidence she should have introduced evidence to the contrary, but instead Kurtz declared that the City's evidence was undisputed and submitted no evidence of her own.

9. One other statement in Kurtz's petition deserves special attention:

> Petitioner Kurtz does not dispute that there is evidence to support the conclusion that smoking and tobacco use are linked to a higher risk of certain health problems. The Petitioner does not dispute that government employers may restrict, or even ban, smoking in government buildings or during work hours. She does not dispute that a government employer may, in order to reduce costs, implement a voluntary smoking cessation program, or similar voluntary measures. **She also does not dispute that a restriction on off-duty or even pre-hiring tobacco use may be justified for certain jobs.** . . .

Kurtz's Petition at p. 5 (emphasis supplied).

Indeed, Kurtz has **always** conceded both the legitimacy and essential rationality of the City's policy. When

Kurtz concedes the rationality of restrictions on employees' off-duty smoking, as in *Grusendorf v. City of Oklahoma City*, 816 F.2d 539 (10th Cir. 1987), and the rationality of not hiring tobacco-users "for certain jobs," Kurtz is *sotto voce* conceding the rationality of the City's **actual policy**, for she never introduced evidence that the City's actual policy is "irrational" in ways that her supposed "better alternatives" are not.[12]

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[12] To apply such "reasoning" to the leading Supreme Court decision cited by Kurtz (*Kelly v. Johnson*, 425 U.S. 238 (1976)), one must imagine that Mr. Kelly's attorney challenged the rationality of the police department's tonsorial regulations **solely** by asserting – without any evidentiary support – that it would be "better" if all policemen had to wear lighted beanies and neon tutus to achieve the government's goals of "recognizability" and "uniformity of appearance," without even bothering to submit any **evidence** that such proposed alternatives were "more rational" in any respect. Likewise, Kurtz submitted no testimony or evidence showing that it is "irrational" for the City to decide to gradually reduce the number of smokers in its workforce, rather than (as Kurtz proposed) hiring smokers but denying them health insurance benefits, or using spies and "smoking-police" to enforce off-duty smoking restrictions (a là *Grusendorf*). While Kurtz's attorney claims that the City's policy would be justified only "for certain jobs where a particular level of physical fitness is legitimately needed," there is literally *nothing* in the record to support that claim, and it overlooks the undisputed evidence that the City's policy was justified not by any concern that a smoking-typist is less qualified **as a typist**, nor a smoking-policeman less qualified **as a policeman**, but rather that a **workforce** of nonsmokers is more qualified as a workforce in terms of productivity and overall costs of morbidity, absenteeism, etc. Certainly Kurtz cannot claim – and in fact has not claimed – that lung cancer and the plethora of other illnesses caused by tobacco selectively affects firemen but not secretaries! As explained in the City's Florida Supreme Court briefs, the undisputed empirical evidence which justified the

It is and always has been **undisputed** that the City's policy is designed to achieve legitimate objectives – saving taxpayer money being only the most obvious – and Kurtz did not even attempt to show that the policy will not rationally advance and promote those legitimate objectives. That is why at trial and in the Florida appellate courts Kurtz consistently argued that the City's policy was unconstitutional because it was underinclusive (it ignores skydiving Twinkie-eaters); or overinclusive (it excludes individual tobacco-users who may not get sick); or, in the unsupported opinion of Kurtz's attorney, that other measures would somehow be "better."

Kurtz rightly eschewed any evidentiary challenge to the City's policy, and rightly informed the trial judge that the evidence was undisputed, because (1) No less than thirty-thousand (30,000) scientific studies have proven the cause-and-effect relationship between tobacco-use and a myriad of costly and debilitating illnesses, so that is a **FACT** which only fools and the tobacco-cartel would dispute; (2) It is thus rational on its face for an employer selecting a workforce to discriminate in favor of non-users of tobacco, especially a self-insured public employer who uses tax revenues to pay 100 percent of

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City's policy proved that smokers' higher rates of morbidity, mortality, and absenteeism meant they were more expensive and less productive overall as public workers, and therefore tobacco use was demonstrably related to **all employees' job functions**, in that the "job function" of *all* public employees is to perform their jobs (whatever the job may be), and obviously no job is performed when the employee hired to perform that job – any job – is not performing that job due to smoking-related illnesses.

employee medical expenses, because a more-healthy workforce is less costly and more productive regardless of particular job function; (3) If an employer hires only those who have not used tobacco in the preceding year (a category which includes all those who never used tobacco, those who have not for many years, as well as those who have successfully quit), that will tend to reduce the relative number of tobacco-users in the workforce, which will tend to produce a more-healthy workforce, which will tend to produce a less-costly and more productive workforce. *Q.E.D.*

Given the indisputable rationality of the challenged policy, the only question is whether it is legally illegitimate to rationally discriminate against tobacco-users. The answer is that some states have laws prohibiting such discrimination, some states do not, while still other states require such discrimination. As explained *infra* at footnote 18, Florida currently falls in the latter categories. While the States and Congress may define such rational discrimination as illegitimate, the Fourteenth Amendment to the United States Constitution does not command them to do so. Because tobacco-users are not a suspect class nor tobacco-use a fundamental right, all the Fourteenth Amendment demands is a reasonable governmental objective and a rational "fit" between the objective and the selected methodology. Here the legitimacy of the government's goals (lower costs, healthier workforce, higher productivity, etc.) and the rationality of the chosen method of achieving the goals (reduced number of tobacco-users in workforce) were **not even contested** by Kurtz, and were in any event proved beyond a reasonable doubt. Accordingly, unless the

Supreme Court is prepared to rule that *Nicotiana Tabacum* deserves a special place of honor in our pantheon of fundamental values, alongside Bibles, ballots and political broadsides, there is no arguable constitutional violation in this case and there never was one. Which leads to the final reason why Kurtz's Petition ought to be denied.

ARGUMENT

THIS CASE RAISES NO IMPORTANT OR UNDECIDED CONSTITUTIONAL QUESTION, AND THE FLORIDA COURTS' RULINGS ARE IN COMPLETE HARMONY WITH THE DUE PROCESS JURISPRUDENCE OF THE UNITED STATES SUPREME COURT.

Kurtz claims that the Florida Supreme Court's "ruling" is contrary to this Court's substantive due process jurisprudence (Petition at 6), yet she also claims that the "ruling" raises an undecided issue which this Court needs to resolve (Petition at 10). Aside from the fact that these claims are logically contradictory, both claims are untrue. This case raises no important or undecided constitutional issue, for even if the Florida Supreme Court had actually ruled on a federal "substantive due process" question (which it did not), that ruling would be **entirely consistent** with the past half-century of this Court's due process jurisprudence.

Of course, the abstract question must first be stated correctly:

> Does the Due Process Clause of the Fourteenth Amendment permit governments to discriminate against those applicants for public employment who use tobacco where it is an undisputed and indisputable fact that such discrimination will significantly reduce government expenditures, will result in significantly-improved worker productivity and reduced absenteeism, and will also help ameliorate the Nation's most serious public health problem?

As this Court explained in *Reno v. Flores*, 113 S. Ct. 1439, 1447 (1993), a substantive due process claim seeks to forbid the government from infringing a "fundamental liberty interest." Kurtz has never articulated **any** underlying liberty interest – fundamental or otherwise – which she contends is or ought to be protected in this case; and she has always conceded that she has no constitutional right to use tobacco **or** to be hired as a City employee. Certainly none of the cases cited by Kurtz – not one – indicate that the City has violated Kurtz's federal constitutional rights.

Kelly v. Johnson, supra, the principal case cited by Kurtz, plainly does not support Kurtz's suggestion that the City has encroached upon Kurtz's constitutional rights. Even ignoring the fact that it is preposterous to equate the "problem of sideburned cops" with the problem of 430,000 dead Americans each year (and millions more dying and disabled and tens of billions of wasted dollars, etc.) caused by the scourge of tobacco, *Kelly* held that since fundamental liberty rights were **not** at stake, the employer's mere desire to maintain employee

"similarity of appearance" and "recognizability" was sufficient justification to defeat the respondent's Fourteenth Amendment challenge to a city's grooming regulations:

> We think the answer here is so clear that the district court was quite right in the first instance to have **dismissed** respondent's complaint. Neither this court, the court of appeals, nor the district court is in a position to weigh the policy arguments in favor of and against [the regulation]. The constitutional issue to be decided by these courts is whether petitioner's determination that such regulation should be enacted is so irrational that it may be branded 'arbitrary'. . . .

425 U.S. at 247-248 (emphasis supplied).

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), also cited by Kurtz, this Court rejected a due process challenge by a teacher who was not (**re**-)hired for a public job:

> [O]n the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another. . . . Respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment.

408 U.S. at 575-579.

Kurtz also cites *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), which sustained a Massachusetts law requiring the termination of police officers when they reached age 50, based on the state's claim of a

general relationship between age and physical ability. This Court stated that since no fundamental right or suspect classification was involved, "bare rationality" was all that was required to sustain the statute, and so the state was not required to test individual "fitness" for a job even if that might be a "better" means of achieving the government's goal:

> That the state chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally related to a maximum age limitation. . . . [W]here rationality is the test, a state 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'

427 U.S. 307 at 316. The undisputed evidence in this case proved a far more robust relationship between tobacco-use and high worker morbidity, absenteeism and medical costs, and low productivity, than the claimed relationship in *Murgia* between age and physical ability.

Another case cited by Petitioner is *Vance v. Bradley*, 440 U.S. 93 (1979), which also addressed a regulation terminating government employees based on age, and this Court reiterated that when neither fundamental rights nor suspect classifications are involved, the wisdom and efficacy of such regulations are to be addressed through the democratic process unless the plaintiff shows that the regulations are truly irrational. In *Vance* the Court upheld the rule as rationally-related to the government's goal of boosting productivity, and observed again

that even if the rule was both under-and over-inclusive, that did not permit the courts to invalidate the policy:

> Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'

440 U.S. at 108.[13]

The Court noted in *Vance* that appellees had admitted the relationship between age and reduced capabilities, just as Kurtz has conceded, over and over again (even in

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[13] The Court stated that an **assumed general relationship** between age and physical condition was a sufficiently rational basis for the regulation, and the fact that some older employees could have continued to perform despite their age, or that some younger employees could not, was irrelevant to the question of rationality. "Whether we, or the district court, think Congress was unwise in not choosing a means more precisely related to its primary purpose is irrelevant." *Id.* at 109. The Court also held that the government did not even need empirical evidence to justify its regulations:

> Appellees seem to believe that appellants had to have current empirical proof that health and energy tend to decline somewhat by age 60 and had to offer such proof for the district court's perusal before the statute could be sustained. . . . **[H]owever, those challenging the legislative judgment must convince the Court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.** . . . Appellees have not satisfied these requirements.

440 U.S. at 110-111. *See also City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51-52 (1986).

her Petition to this Court), the indisputable relationship between tobacco use and a myriad of illnesses and disabilities. In *Vance* as in the instant case, the employee argued that other policies would be fairer and more efficacious, and this Court replied that it was not within the competency of the courts to arbitrate such disputes over policy alternatives. *Id.* at 112.[14]

In *Grusendorf v. City of Oklahoma, supra,* the court upheld a far more intrusive and draconian "anti-tobacco" employment policy, one which led to the **firing of an employee** for taking three puffs of a cigarette while off-duty, and it did so **without** any of the overwhelming evidence of rationality which exists in the instant case.[15]

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[14] *Dilulio v. Board of Fire and Police Commissioners,* 682 F.2d 666 (7th Cir. 1982), also cited by Petitioner, merely reiterates that holding. There the court stated that the constitutional validity of a government employment regulation does not depend "on the availability of other employment selection procedures that would have a less discriminatory impact." In the due process context, the court remarked that there is no basis for courts to inquire whether a particular policy "is most efficacious." *Id.* at 671. The court also stated that plaintiffs could not prevail "by relying on allegations contained in their complaint or on affidavits that merely state a conclusory allegation, as did the affidavit of the plaintiffs' counsel." *Id.* **In the present case, Kurtz sought summary judgment yet did not even submit an affidavit, conclusory or otherwise, challenging the City's evidence of rationality, and in fact stipulated that all of the City's evidence was undisputed.**

[15] The court in *Grusendorf* stated that the "proof" of the rationality of the city's policy was the warning label printed on the side of all cigarette packages sold in America. 816 F.2d at 543. It is fallacious for Kurtz to attempt to distinguish *Grusendorf* on the theory that while a rational relationship may exist between "anti-tobacco" policies and firemen like Grusendorf,

All of the other cases cited by Kurtz are completely irrelevant.[16]

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no such rational relationship exists between such policies and secretaries like Kurtz. The Oklahoma City policy was justified by the same relationship between tobacco-use and employee health costs: In *Grusendorf* the city sought to reduce Workers' Compensation benefits paid to employees seeking compensation for smoke-related illnesses caused by deliberate smoke inhalation, and that goal of not wasting tax dollars due to self-inflicted employee illness is the **same goal** which justifies the policy *sub judice*.

[16] *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), held that the First Amendment bars governments from using the patronage system to violate associational rights; *Perry v. Sindermann*, 408 U.S. 593 (1972), held that states cannot refuse to rehire employees because they exercised their First Amendment rights; *Reed v. Reed*, 401 U.S. 71 (1971), involved a state law which irrationally gave preference to the male survivors of a decedent for estate administration purposes; *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), was a First Amendment case involving laws targeting seditious college teachers; *Watson v. City of Memphis*, 373 U.S. 526 (1963), was a desegregation decision; *Konigsbergg v. State Bar of California*, 366 U.S. 36 (1961), involved fundamental First Amendment rights of free speech and association; *Shelton v. Tucker*, 364 U.S. 479 (1960), involved First Amendment rights of free speech, association and religion; *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), held invidious the exclusion from the practice of law of youthful Socialists and supporters of loyalists in the Spanish Civil War; *DeWeese v. Town of Palm Beach*, 812 F.2d 1365 (11th Cir. 1987), struck down an ordinance against "shirtless jogging" because the town did not have a legitimate governmental interest or a rational basis for the ordinance; *Lidell v. State*, 731 F.2d 1294 (8th Cir. 1984), held that governments could not manipulate their budgets to avoid desegregation; and *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir. 1975), and *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972). both held that – despite this

Thus all of the relevant cases cited by Kurtz actually confirm the constitutionality of the policy *sub judice*, as do the many other relevant Supreme Court decisions which Kurtz does **not** cite because they confirm that cities certainly are **not** required by the Fourteenth Amendment to employ tobacco-users if they have a rational basis for wishing not to do so. *See e.g., Waters v. Churchill,* 115 S. Ct. 49 (1994) (affirming government's right to restrict even **fundamental** liberty interests when it is acting as an employer rather than acting as sovereign); *Flemming v. Nester,* 363 U.S. 603, 611-612 (1990); *Bowers v. Hardwick,* 478 U.S. 186 (1986); *Kodel v. Indiana,* 452 U.S. 314 (1981) (holding that it is the plaintiff's burden to prove that a challenged regulation is unrelated to the achievement of **any legitimate purposes**); *City of New Orleans v. Dukes,* 427 U.S. 297 (1975); *Weinberger v. Salfi,* 422 U.S. 749 (1975) (affirming that "prophylactic" policy presumptions, even when irrebuttable, are not irrational); *Graham v. Richardson,* 403 U.S. 365, 375 (1971) (confirming that suspect classifications are those which discriminate on the basis of race, nationality, or alienage); *Dandridge v. Williams,* 397 U.S. 471 (1970); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (reducing government expenditures is a legitimate governmental goal); *Ferguson v. Skrupa,* 372 U.S. 726 (1963); *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.,* 335 U.S. 525 (1949); *United States v. Carolene Products Co.,* 304 U.S. 144 (1938) ("Where the legislative judgment is called in question [the inquiry] must be restricted to the issue whether any state of facts either

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Court's ruling in *Kelly* – "tonsorial styles" are not a rational basis for excluding adult students or firing college professors.

known or which could be reasonably assumed, afford support for [the legislation]"); *Austin v. Tennessee*, 179 U.S. 343 (1900) (holding it within the province of government to prohibit the sale of cigarettes altogether, and remarking that the Court would be "shutting our eyes to what is constantly passing before them" [*id.* at 348] not to recognize the deleterious effects of cigarettes). *See also Webster v. Reproductive Health Services, Inc.*, 492 U.S. 490 (1989) and *Harris v. McRae*, 448 U.S. 297 at 313-318 (1980), holding that government is not required to subsidize or support private conduct, even when fundamental rights are involved, and is entitled to express value-judgments in the distribution of public funds and benefits.[17]

In *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979), the City Transit Authority refused to hire anyone, for **any position**, if they used methadone, a lawful drug. This Court held that the government need not substitute individualized "fitness" examinations for an across-the-board policy of exclusion (*id.* at 590-591), and rejected the "Due Process/Irrebuttable Presumption" argument – the same advanced by Kurtz – as having "no merit." This Court sustained the policy on the basis of evidence of

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[17] *Also see Picou v. Gillum*, 874 F.2d 1519 (11th Cir. 1989), affirming a law requiring motorcyclists to wear helmets because the costs of highway injuries are partly borne by the public; and *National Paint & Coatings Ass'n v. Chicago*, 45 F.3d 1124 (7th Cir. 1995), *cert. denied*, 115 S. Ct. 2579 (1995), affirming the constitutionality of Chicago's outright ban on spray paint because paints are not constitutionally protected and it is rational for governments to make the normal economic assumption that humans respond to incentives and disincentives imposed on their conduct.

"relevant differences" between methadone users and nonusers. *Id.* at 588. In the instant case the City proved through massive and **undisputed** evidence the substantial cost-and-productivity differences between tobacco users and nonusers.

Finally, Kurtz asserts that the City's policy "will open up virtually every aspect of a person's private life to intrusive governmental regulation in the supposed interest of cost-cutting." That is nonsense. First, the Florida Supreme Court specifically stated that its holding was limited to the narrow issue presented and was based on the special evidentiary circumstances in **this** case. Second, not **every** political and social controversy in American society needs to be – or ought to be – settled by the federal judiciary. As this Court stated in *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985), when social or economic legislation is at issue, the Fourteenth Amendment allows the States wide latitude because the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.[18]

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[18] The specific issue of "smokers' rights" is properly being addressed by the States. *Compare* 1987 Mass. Acts 697 (barring state agencies from hiring smokers) and Fla. Stat., § 633.34(b) (1963) (barring certain Florida local governmental agencies from hiring smokers), with the "Smokers' Rights" laws – such as Or. Rev. Stat. § 659.380 (1991) and Va. Code Ann. § 15.1-29.18 (1989) – which have been adopted by roughly half the States to **prohibit** job discrimination based on use of tobacco. Garner, *Protecting Job Opportunities of Smokers*, 23 Seaton Hall L. Rev. 417, 422 (1993); Crumbly, et al., *Where They Smoke*, The Fla. Bar J. 108-111 at n.8 (Oct. 1994). Such "Smokers' Rights" statutes, banning discriminatory employment policies aimed at tobacco-users, have in fact twice passed the Florida Legislature: Florida

The issue of "smokers' rights" is a public policy (*political*) question for the state legislatures and Congress to address, not an excuse for the invention of a spurious new "civil right." See Garner, *supra*, at 430-43, commenting that tobacco-use does not present a constitutional question ("were tobacco-use to go the way of spitting on the streets, no one who cares about civil rights would mourn its passing"), and adding –

> If the deep suffering caused by 400,000 smoking deaths a year is ever going to be relieved, smoking must not receive the imprimatur of social approval accorded such activities as going to the church of one's choice. One of the very last things America needs is to see its hard earned public health gains derailed or compromised by dignifying smoking as a protected constitutional right.

———♦———

House Bill 1799 (1990) prohibited any employer from discriminating against employees because of off-duty use of tobacco, but that bill was vetoed by Republican Governor Martinez on July 3, 1990; Florida House Bill 1753 (S.B. 1238) (1992) also made it unlawful for employers to discriminate on the basis of off-duty use of tobacco, but that bill was vetoed by Democratic Governor Chiles on April 10, 1992. Similar bills were proposed in both 1993 and 1994 to move Florida into the column of states – apparently a slight majority – which prohibit "employment discrimination" based on tobacco use.

CONCLUSION

Dade County Circuit Judge Sidney Shapiro, the only judge who actually ruled on a federal question presented to him, correctly applied this Court's Fourteenth Amendment jurisprudence when he rejected Kurtz's challenge to the North Miami regulation. The *undisputed, unchallenged, unrebutted,* and *overwhelming* evidence proved that the City's policy is legitimate and rational in every respect, and Kurtz introduced not one scintilla of evidence to the contrary. The Florida district court decided *only* a state-law issue and certified *only* that issue to the Florida Supreme Court. The Florida Supreme Court decided *only* the state law issue briefed and argued by the parties. And finally, the Fourteenth Amendment permits the City to rationally decide not to hire tobacco-users as employees. The Court should deny Kurtz's Petition.

Respectfully submitted,

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No. 95-545

In The

Supreme Court of the United States

October Term, 1995

ARLENE KURTZ,

Petitioner,

vs.

CITY OF NORTH MIAMI, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari
From The Florida Supreme Court

APPENDIX TO THE BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

NOVEMBER 23, 1993

ARLENE KURTZ, Appellant,	**	
vs.	**	CASE NO. 92-2038
THE CITY OF NORTH MIAMI, FLORIDA, Appellee.	**	

Because the issue decided in this case is one of great public importance, we certify the following question to the Florida Supreme Court pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v):

> Does Article I, Section 23 of the Florida Constitution prohibit a municipality from requiring job applicants to refrain from using tobacco or tobacco products for one year before applying for, and as a condition for being considered for employment, even where the use of tobacco is not related to job function in the position sought by the applicant?

Hubbart, Jorgenson and Cope, JJ., concur.

A True Copy

* * *

THE SUPREME COURT OF FLORIDA

CASE NO.: 82,836

THE CITY OF NORTH MIAMI, FLORIDA,

Petitioner,

vs.

ARLENE KURTZ,

Respondent.

/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT

Case No. 92-2038

PETITIONER'S INITIAL BRIEF ON THE MERITS

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APPENDIX F Affidavit of Lee R. Feldman with appendices:

Feldman 1 Savings from Smoker Attrition (Weiss)

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APPENDIX G Table of Contents for Petitioner's Composite Trial Exhibits "I" through "IV"

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The Third District certified the following question:

> Does Article 1, Section 23 of the Florida Constitution prohibit a municipality from requiring job applicants to refrain from using tobacco or tobacco products for one year before applying for, and as a condition for being considered for employment, even where the use of tobacco is not related to job function in the position sought by the applicant?

(Nov. 23, 1993 Certification Order).

Because the real issue in this case is whether the Privacy Amendment requires the public to use tax dollars to subsidize the cost of private conduct which is job-related, a better phrasing of the issue is:

> Does the Florida Privacy Amendment forbid communities from taking into consideration, in making public-employment decisions, the financial and productivity costs of smoking, and so compel them to continue using public money to subsidize the costs of smoking and thus contribute to the nation's worst public-health crisis?

NOTE ON REFERENCES IN BRIEF

Citations to the Record will be identified as "R. ___" and transcript citations by date and page ("July 8, 1991 TT. ___"). Accompanying this brief is an Appendix which will be referred to as "App. Exh. ___".

* * *

(The Full Version)

Plaintiff's lawsuit: ARLENE KURTZ's suit alleged that the challenged City regulation (App. Exh. "C") of not hiring any more smokers violated her constitutional rights under the Fourteenth Amendment and the Florida Privacy Amendment. (R.2-7).[2] The City by summary judgment motion and memoranda asserted that there was no State or Federal constitutional right which guaranteed a government job to tobacco users; that the relative wisdom or efficacy of its regulation was not the issue for adjudication; and that the City's regulation should be sustained because the City's policy was perfectly legitimate and rational.[3]

By introducing multiple volumes of empirical evidence which supported its regulation, the City demonstrated that the regulation promoted vital public objectives. (R. 179-2369, 2413-2419). The City's evidence conclusively demonstrated that workers who smoke are much more often ill and have much higher medical

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[2] Ms. KURTZ did not ask for damages, back pay, or a court order directing the City to employ her or even to re-interview her. (R. 2-7). Ms. KURTZ's attorney so stipulated during Ms. KURTZ's deposition (R. 2371-2412) at pp. 4-5, and at the summary judgment hearing of Nov. 25, 1991.

[3] Ms. KURTZ's attorney acknowledged that the City's policy satisfied the "rational basis" test (July 8, 1991 TT. 7, 8, 9, 13), in that the City's objectives were legitimate and the means used were rational. July 8, 1991 TT. 6, 15; see also Kurtz Motion for Judgment on the Pleadings (R. 74). Ms. KURTZ's attorney conceded that the City's policy would promote the City's legitimate objectives because smokers as a group did have higher medical costs than nonsmokers. July 8, 1991 TT. 11.

expenses and rates of absenteeism (irrespective of particular "job function"), and that the reduction of the number of smoking employees will substantially reduce the City's medical costs and improve productivity.[4] Through its *undisputed* evidence the City also proved the following salient facts:

– As former HEW director Dr. Lewis Sullivan once remarked, **"cigarettes are the only legal product that when used as intended cause death."** (New York Times, Feb. 2, 1991, at A-18). Tens of thousands of scientific

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[4] The City's evidence demonstrated that smoking constitutes the single greatest public health menace in the United States, and one which the Federal Government has *officially urged* all public institutions to combat. See 1989 Surgeon General's 689-page Report, *Reducing the Consequences of Smoking;* Covering transmittal letter to the President (Petitioner's Comp. Exh. IV, parts I and II). Only a few weeks ago eight past and present Surgeons General, from the Eisenhower through the Clinton Administrations, met in Washington to again appeal for public institutions to discourage smoking, stating that the nation "remains in tobacco's death grip." (New York Times, Jan. 12, 1994 at C-12). See *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525 (1949); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), for the proposition that courts are to accept all reasonable justifications for government policies even when they are hypothetical (which in this case they are not). In a decision which has often been cited by this Court, the Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), held that social and economic legislation is to be upheld if any state of facts, including assumed facts, would support the legislation, and that the existence of supporting facts "is to be presumed." *See, e.g., H.R.S. v. West*, 378 So. 2d 1220, 1225 (Fla. 1979); *Cilento v. Florida*, 377 So. 2d 663, 665 (Fla. 1979); *Hamilton v. Florida*, 366 So. 2d 8, 11 (Fla. 1978); *State v. Bales*, 343 So. 2d 9 (Fla. 1977).

studies have confirmed the cause-and-effect relationship between tobacco use and a multitude of deadly illnesses.[5] As one former Surgeon General stated, "smoking represents the most extensively documented cause of disease ever investigated in the history of biomedical research." Thousands of scientific studies have proved beyond contradiction that smoking is the leading and most avoidable cause of illness and death in our society. (*1990 Report of the Surgeon General,* "The Health Benefits of Smoking Cessation," Centers for Disease Control (1990), at page x.)[6]

– Smoking not only causes lung cancer, emphysema, and other obstructive illnesses of the lungs as well as cancer of the mouth, throat and larynx, but also coronary artery disease and heart disease (the **leading** causes of

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[5] Vogt & Schweitzer, 22 Amer. J. of Epidemiology 1060, 1066 (1985) report that 30,000-to-40,000 research studies have proven the basic empirical facts which underlie the City's policy. The accompanying Appendix contains *some* of the affidavits and other materials submitted by the City. However, space constraints prevent the City from including or even summarizing most of the evidence contained in the six volumes of exhibits which it submitted. (The index to the City's evidence is contained in the Appendix as Exhibit "G".)

[6] See the *1990 Surgeon General Report* ("Executive Summary") at p. x (contained in Composite Exh. IV, Parts I & II, of the City's summary judgment exhibits). The City is entitled to rely on that evidence in adopting its regulations and policies. *Renton v. Playtime Theaters,* 475 U.S. 41, 106 S.Ct. 925 (1986). See also *Grusendorf v. City of Oklahoma City,* 816 F.2d 539 (10th Cir. 1987), where the Court sustained a far more draconian "no-smokers" regulation on the basis of nothing more than the warning label which by Federal law must be printed on the side of every package of cigarettes sold in the United States.

death in the United States); compared with non-smokers, smokers have twice the risk of stroke, by itself the third leading cause of death in the United States. The mortality rate from abdominal aortic aneurism is two to five times higher in smokers than in non-smokers; smoking is a major cause of peripheral artery occlusive disease, including gangrene and loss of limbs; cigarette smoking substantially increases the risk of respiratory infections such as influenza, pneumonia, and bronchitis, which themselves constitute the sixth leading cause of death in the United States. Smoking also causes gastric ulcers and increases the risk of cancer of the pancreas and bladder. *1990 Report of the Surgeon General* "Executive Summary," at xi. Each of these myriad illnesses is a major cause of worker-absenteeism. The scientific evidence of the cause and effect relationship between smoking and these and myriad other illnesses and diseases (most recently even leukemia and cataracts have been added to the list) is overwhelming. Indeed, the evidence of the causal relationship between smoking and illness was even acknowledged by the Florida legislature 15 years ago. (*See* §381.3712, *Fla. Stat.* (1979), acknowledging smoking as a causal factor in many types of cancers).[7]

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[7] Benzene is a carcinogenic agent highly restricted by Federal law. A couple of years ago Perrier water was banned from distribution in the United States and actually pulled from store shelves because of Benzene readings of 16 parts per billion. According to the *1986 Surgeon General's Report*, cigarettes contain between 11,000 and 43,000 parts per billion of Benzene, 2,000 times more than the "dangerously polluted" Perrier water, yet are sold daily for a private profit. In fact, cigarettes contain over 43 carcinogenic chemicals according to the *1989 Surgeon General's Report*.

– Although one might not realize it from reading the daily newspapers, ***smoking actually causes more deaths than ALL crime, automobile accidents, fires, AIDS, cocaine, heroin, alcohol and suicides put together.*** (258 J. of Amer. Med. Ass'n (JAMA) at 2080 (1987)). Smoking is now killing approximately 420,000 Americans each year, or an American death rate equal to eight, eight-year Vietnam wars every year. Thus former Surgeon General Koop rightly stated in his 1982 report that smoking is the **"most important public health issue of our time."**[8]

– In narrow economic terms, the national cost of smoking-caused illness is 50 billion dollars; the State of Florida wastes approximately *two billion dollars* and 204,000 years of lost human life, each and every year on smoking illnesses. See *Smoking & Health, A National Status Report*, A Report to Congress (2d Ed. 1990), contained in Petitioner's Comp. Exh. I. In other words, if Floridians could be induced to quit smoking, the resulting savings would pay for all of the needed improvements to our

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[8] In an average group of 100 young smokers, one will lose their life due to murder, two to automobile accidents, and 25 to the effects of smoking. (*The Health Consequences of Smoking: Nicotine Addiction*, 1988 Report of the Surgeon General, U.S. Department of Health and Human Services). See Shultz affidavit (App. Exh. "E") at pp. 15-16. While the Third District found unimpressive the City's immediate interest in saving millions of dollars in public tax revenues by reducing the number of smokers in its work force, it totally ignored the broader and more compelling reason for the policy, namely that public institutions must stop subsidizing and "coddling" tobacco use, especially by their own public employees, if the United States is **ever** to deal with the nation's most serious public health crisis and stop 420,000 needless American deaths every year.

schools and the entire criminal justice system, with enough left over to modernize the entire court system. Equivalent improvements to public services would accrue on the local level (police; services for youth and the elderly; housing for the homeless; treatment for the mentally ill, etc.), to the extent that local communities finally take seriously the urgent pleas of all Surgeons General since the 1960's that **government begin to implement disincentives to discourage smoking rather than continuing to subsidize and coddle such suicidal behavior.**

– The direct economic costs of smoking are exceedingly high for the smoker's employer as well. According to the NADL Journal (January-February 1983), pp. 28-29, smoking costs American employers over **27 billion dollars** ($27,000,000,000) per year in extra absenteeism and health care costs. Men under 45 who smoke two packs of cigarettes a day face more than $56,000 of additional medical costs and most of that extra cost is borne by their insurers **which in this case are the people of North Miami.** G. Oster, *et al.*, The Economic Costs of Smoking and Benefits of Quitting, 4 (1984), at xvii. Each smoking employee costs the City taxpayers as much as $4,500 extra per year, year-in and year-out (a fact which is proven and undisputed in this litigation). Daynard, *Smoke Gets in Your Bottom Line*, 5 Boston J. 3 (1985).[9]

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[9] Weis, *Profits Up In Smoke*, Indiana Bus. J. 18-19 (1981) summarizes various studies and concludes that $3,195-to-$4,500 per year was the average additional cost of employing a smoker. Weis, supra, *Can You Afford to Hire Smokers?* The actual cost may be slightly higher: *see* Management World, Sept. 1981, pp. 39-40 (stating that each new smoking employee costs an employer $4,789 per year in additional expenses); 60[3] Personnel J.

All of these facts were established by the City and were never contradicted by Ms. KURTZ.

Accompanying the City's Motion for Summary Judgment was the detailed, 30-page affidavit of Dr. James Shultz of the Department of Epidemiology and Public Health, University of Miami School of Medicine. (App. Exh. "E"). Dr. Shultz is a nationally-recognized expert in

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162-165 Mar. 3, 1981). *See also* Gabel, et al., *Smoking Policies*, 83(1) Southern Med. J. 17 (1990). After a seven-year study of the medical requirements of smokers and nonsmokers, it was found that smokers spent, on average, 17 days more in the hospital. 22[6] Am. J. of Epidemiology 1060-1066 (1985). An even more recent study by a group of hospitals, covering 10 states, found that smokers' insurance claims were 24% higher on average than for nonsmokers. Wall St. J., Mar. 6, 1990, at B1. Health and disability insurers like Blue Cross report that claims for smokers run as high as 28% more than for nonsmokers. (*1989 Surgeon General's Report*, at Table 17, p. 549. To the same effect, see Milliman & Robertson, Health Risks and Behavior (1987), finding that smokers are 29% more likely to have large (over $5,000) annual insurance claims and to require far more days of hospitalization.

After reviewing the extensive scientific literature, the Kristein study concluded that "Smokers have 33%-to-45% excessive absenteeism." Kristein, 12 Preventative Medicine 358, 366 (1983) (contained in Petitioner's Comp. Exh. I). There are other "hidden" costs of having smoking workers: Fires are accidentally set, and City automobiles and equipment damaged by surreptitious smokers. Indeed, smokers even cost more money in terms of accidental injury and related workers' compensation costs due to accidents caused by eye inflammation and hand interference. Gabel, *et al.*, *Smoking Policies*, 83(1) Southern Med. J. at p. 9 (1990), reporting that smokers have more automobile accidents and moving violations; Lippiatt, 19 Preventive Med. 515 (1990), reports that cigarette-fires annually cause 8,500 deaths and injuries and half a billion dollars in property losses.

the field of behavioral epidemiology, the study of the patterns of human disease, and his research specialty is the health effects of cigarette smoking. Basing his conclusions on nearly **100 national scientific studies,** Dr. Shultz stated that the additional cost to North Miami of each smoking employee is as high as $4,611 (1981 dollars) per year. Those costs include increased absenteeism and early mortality, increased non-health insurance costs, and job time lost. (App. Exh. "E") Dr. Shultz also confirmed the scientific basis for the City's one-year cessation requirement, based on the empirical evidence regarding the addictive qualities of smoking and relapse rates over various periods of time. (*Id.*).

Approximately 17% of the City of North Miami workforce now smokes. The City is fully self-insured with respect to employee medical costs and pays 100% of its workers' medical expenses from taxes in the general fund. See Lee R. Feldman depo. (App. Exh. "F") at pp. 47-50; Adele Hartstein affidavit (App. Exh. "D"). Even using the **most conservative** figures cited by Dr. Shultz, the City spends hundreds of thousands of extra dollars **each year** in additional medical costs plus lost productivity due to smoking workers. Assuming normal turnover and retirement, the City will thus **unquestionably** save millions of dollars if it stops hiring smoking employees.[10] Those savings can now be used to pay for

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[10] See Affidavit of Deputy City Manager Lee R. Feldman (App. Exh. "F") which contained projections of future savings to the City based on the various national studies cited in Dr. Shultz's affidavit. Mr. Feldman projected total cumulative savings to the City as high as 14 million dollars over the next 20 years. The City submitted over 50 scientific studies and reports which supported Mr. Feldman's projections.

hot meals and medical transportation for the elderly, housing and care for the homeless, additional police protection, or other major programs. The City will save not only in medical costs: In an average group of 100 smoking employees, 25 will die from smoking: each such employee's death will be slow and agonizing, costing the City tens of thousands of dollars in direct medical, hospital and drug expenses, and each death will result in jobs remaining unperformed for months and then filled with inexperienced workers who require special training and are less efficient and productive in their labor.

As of 1991, 60.9% of American cities have revenues which are exceeded by expenditures, and 87.2% of those cities attributed their negative balance sheets to the rising cost of employee health benefits. (Chicago Tribune, July 9, 1991, at 11, reporting study by National League of Cities.) **The rising cost of health care is now widely considered the single most compelling economic problem in the United States, and tobacco has played a dominant role in creating that crisis.**[11]

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[11] *"I think we are spending a ton of money in private insurance and government tax payments to deal with the health-care problems occasioned by bad health habits, and particularly smoking."*

President Bill Clinton
February 25, 1993

As the January 1994 meeting of the seven former Surgeons General, they noted that more than **two million Americans** have been killed by the tobacco industry since the first Surgeon General's report on smoking in 1964, yet "the most lethal and addictive product in our society" continues to be pushed by the tobacco industry which has a "political stranglehold" on most governmental agencies. (New York Times, Jan. 12, 1994 at c-12; Dallas Morning News, Jan. 12, 1994 at 6-A).

As reflected by the data summarized above and as confirmed by the National Institutes of Health in its October 1989 Report, *Guide to Public Health Practice* (at p. ix), tobacco use in all its forms is thus having "**a debilitating and devastating effect on the health of the American people.**" Yet in 1985 alone, the American cigarette manufacturers who are behind this litigation (and would be the sole beneficiaries of a decision in favor of the nominal Plaintiff KURTZ), enjoyed **domestic** annual retail sales of approximately 30.2 billion dollars ($30,200,000,000), selling **600 billion** cigarettes each year in the United States alone. *Smoking Related Deaths and Financial Costs,* U.S. Office of Technology Assessment (1985), at p. 6; *Smoking, Tobacco & Health, a Fact Book,* U.S. Public Health Service (1989) (contained in Petitioner's Comp. Exh. II). Even the merchants of tobacco death have grudgingly come to accept that public and private employers can ban "on-duty" smoking and such restrictions are commonplace. (By state law, smoking is already illegal in public facilities in Florida, except for a few designated areas.) The reason the industry accepts on-duty restrictions is that **they do not decrease tobacco consumption and sales, and so, *ipso facto*, they do not reduce illness either.** On the contrary, when "on-duty" smoking is banned, the main consequence is lower productivity, not less illness **or** higher productivity. Smokers must ingest nicotine, typically every 30-45 minutes, and their need for a "fix" is as strong as that of a heroin addict.[12] When employers merely ban smoking on duty,

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[12] The *1988 Surgeon General's Report* equalizes nicotine and heroin in terms of their addictive properties, state that

> The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that

addicted employees invariably find ways of satisfying their habit through five-to-ten minutes "disappearances" typically twice-an-hour. Thus researchers have concluded that heavy smokers "**are absent from work almost twice as often as their peers.**" Weis, *Can You Afford to Hire Smokers?* Personnel Admin. 72 (May 1981).

The City also proved that its regulation was neither unprecedented nor draconian; that thousands of federal, state and local regulations, ordinances, statutes, and employment policies (including 600 state laws) restrict

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determine addiction to drugs such as heroin and cocaine. (1988 *Surgeon General's Report, supra,* at 9).

The U.S. Centers for Disease Control reported in *Morbidity and Mortality Report,* 39 MMWR 38 (Sept. 28, 1990), at pp. 673 *et seq.,* (contained in Petitioner's Comp. Exh. I), that a Colorado state hospital's ban on workplace smoking resulted in a small reduction in the number of cigarettes smoked at work, offset by increased smoking after work. Thus such bans do not significantly improve the health of workers, and so do not significantly reduce their rate of illness, absenteeism, or medical and insurance expenses.

Moreover, since 1969 it has been established that maternal smoking leads to infant low birth rate and an increased incidence of prematurity, spontaneous abortion, still birth, and neonatal death. *1989 Surgeon General's Report,* at 8; *The Health Consequences of Smoking: 1969 Supplement to the 1967 Public Health Service Review,* U.S. Public Health Service (1969). By 1975 the Surgeon General had linked parental smoking to bronchitis and pneumonia in children. *1989 Surgeon General's Report,* at 9; *The Health Consequences of Smoking,* U.S. Dept. of Health, Education and Welfare (1975). The City's self-insurance of City employees and their family members means that merely barring "on duty" smoking does not protect family members from such illnesses for which the City has to pay.

and regulate the sale, consumption, use, distribution, possession, and advertising of tobacco products. Indeed, in late 1987 the State of Massachusetts adopted a statute barring certain public agencies from hiring smokers, **and even dictating the newly hired employees who later become smokers must be terminated.** (1987 *Illegible Acts* 697). Likewise in *Grusendorf, supra,* 816 F.2d 539 (the only prior case dealing with a claim of "smoking as a civil right"), the Court sustained the constitutionality of a city employment regulation banning even **off-duty** smoking by **already-employed municipal workers.** The City also noted that Florida law already *barred* local governments from employing any firefighter who had smoked within a year of applying. (§ 633.34(b) *Fla. Stat.* (1990)). The City also provided an historical synopsis of smoking regulations, noting that until early in this century as many as **12 states banned the import or sale of cigarettes entirely.** (See Smithsonian, July 1989, at p. 107).

The testimony and affidavits and exhibits submitted by the City in support of its regulation were **overwhelming** and **uncontradicted**: Plaintiff submitted no evidence whatever to demonstrate that the City was not confronting the most compelling of medical, social and fiscal problems, nor did the Plaintiff rebut the City's evidence that its policy would in fact realize significant savings and achieve greater worker productivity and reduced absenteeism by reducing through attrition the number of its employees who smoke.[13]

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[13] In fact, Ms. KURTZ's attorney had no interest whatever in the evidence during the entire trial court proceedings, evidence which she actually characterized as "irrelevant." See Jan.

The summary judgment bearings and ruling: At the summary judgment hearings before Judge Shapiro, Ms. KURTZ's attorney conceded that it was her burden to establish – apparently without evidence – that the challenged regulation was not rationally related to a legitimate government goal. (Nov. 25, 1991 TT. 5; Jan. 7, 1992 TT. 20, 21, 24). Her only argument against the City's regulation was to insist that there were more effective ways of addressing the problem. (*Id.* at 24-29).

The Third District's opinion portrays the issue as one of "informational privacy," focusing on the City's requirement that Ms. KURTZ **disclose** whether she was or was not a tobacco user, which the court described as "intimate" and "private and personal information." **But no such claim was argued by Ms. KURTZ below.** Precisely because Ms. KURTZ's complaint was rather vague about the exact nature of her legal and constitutional claim, she was deposed prior to the summary judgment hearing so the City could ascertain the exact nature of her claims, and Ms. KURTZ provided the following testimony:

By Mr. Echarte (counsel for the City):

Q: Do you smoke?

A: Yes.

. . . .

7, 1992 TT. 23: "As to the . . . factual issue . . . the information that has been provided in support of . . . the defendant's motion for summary judgment **is really irrelevant.**" At the end of the final hearing, the court specifically inquired of Plaintiff's attorney whether there were any facts in dispute so as to prevent a summary judgment, and she stated that there were no material facts in dispute. (Jan. 7, 1992 TT. at 46).

Q: Now, when I initially came out into the lobby you were having a cigarette. Is that correct?

A: Yes.

Q: Miss Kurtz, would it be fair to say that you smoke in public?

A: Yes.

Q: Do you consider smoking to be secret conduct that you engage in?

A: No.

Q: Do you consider the fact that you smoke to be a personal secret?

A: No.

(Kurtz depo. at p. 9; R. 2371).

Judge Shapiro entered his final summary judgment on August 21, 1992, sustaining the City's policy in all respects. Judge Shapiro held that Ms. KURTZ did not have a constitutional right to be employed by the City, and that the right to use tobacco is not a fundamental privacy or liberty right. The court rejected Plaintiff's equal protection attack, noting that the Fourteenth Amendment did not require a government to choose between attacking every aspect of a problem or not attacking the problem at all, and so Plaintiff's argument that the City did not exclude "Twinkie eaters" (or skydivers, overweight individuals, etc.) was irrelevant, because "[a] governmental entity is not bound to deal

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alike with all classes or to strike at all evils at the same time or in the same manner."[14]

The Third District decision: All of Judge Shapiro's findings and legal conclusions were sustained by the Third District, except on the Florida Privacy Amendment issue. As became quite clear at oral argument, the Third District understood that the **actual** policy at issue in the case was perfectly reasonable and that it made no sense to speak of smoking as a "constitutional privacy right" or of smokers as a constitutionally protected class, and that there was no such thing as a smoker's "privacy right" to a government job. What disturbed the court, however, was the prospect that this policy might lead to bizarre future policies aimed at beer drinkers or bacon or Twinkie eaters.[15] To reach its goal of locking shut the

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[14] App. Exh. "B." Judge Shapiro found that the City's employment policy had been promulgated to increase productivity, to reduce absenteeism, and to reduce the City's costs (all of which were undisputed); and that the regulation was based on proper evidence that smoking employees increased the cost of the City's insurance program which was funded by the City's taxpayers. The court found that the objectives achieved by the City regulation (including raising worker productivity) were proper governmental objectives. Judge Shapiro confirmed what Ms. KURTZ's attorney had already stipulated, that Plaintiff had the burden to show that there was no rational relationship between the City's regulation and any legitimate governmental objective; Judge Shapiro found that Plaintiff had failed to carry her burden of proof, and that the evidence presented by the City demonstrated that the government was seeking to achieve proper objectives and was using a proper method of achieving its objectives.

[15] The court's "floodgates" hypothesis is revealed in the opinion itself, where the court wrote that he City's policy might

floodgates against any such "trend," the district court repackaged Ms. KURTZ's actual claim – of a smoker's constitutional right to equal public employment – into one of "informational privacy" arising from the government's inquiry into so-called "sensitive personal information." Thus the Third District analogized the case to those involving the "disclosure of private information" through the use of pen registers, the disclosure of blood donor "confidential information," and the privacy of bank records and psychological/medical records; cases involving "the power to control what we shall reveal about our intimate selves." (Op. pp. 5-6). However, in deciding the case on that basis, the court was compelled to ignore the fact **that no such "informational privacy" claim has ever been upheld by a Florida court and that Ms. KURTZ had actually *disclaimed* any such "information privacy" interest in this case!**

SUMMARY OF ARGUMENT

The City is not directing Ms. KURTZ not to smoke, publicly or privately, and is not doing anything to stop such behavior. If Ms. Kurtz wishes to make the private, autonomous decision to smoke herself to death, that remains entirely her private decision. The Florida Privacy Amendment does not **compel the public to pick up the tab for that private decision.** The Third District has confused private rights with public coddling, and has also confused civil *rights* (equal protection) with civil *liberties*

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be followed by regulations aimed at practices "such as drinking, eating, exercising and engaging in certain sexual practices." (Op. at p. 3).

(privacy). The district court's decision is also irreconcilable with **every Privacy Amendment case which has ever been decided by a Florida court.**

I

THE THIRD DISTRICT'S RULING IS WRONG AS A MATTER OF *STARE DECISIS:* THE RULING CONSTITUTES "AD HOC JURISPRUDENCE" AT ITS MOST ARBITRARY BECAUSE IT IS IRRECONCILABLE WITH ALL OTHER PRIVACY AMENDMENT DECISIONS.

As this Court is aware, the Florida Privacy Amendment has until now been given significant positive meaning only in the context of "right-to-die" and abortion where the government is seeking to compel or forbid some medical procedure on a live human body. Thus the Third District was unable to cite a single Florida privacy case which offers precedential support for its ruling. All the Third District could cite in the way of "authority" was a 1978 law review article by then-private attorney Cope (later one of the judges who decided *Kurtz* below), who was writing as an **advocate** with respect to the then-proposed Privacy Amendment.[16]

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[16] In a prior privacy decision, this Court felt compelled to comment that the legitimacy of the courts was jeopardized when a judge acted as advocate and thereby jeopardized the "pretense of impartiality." *In Re T.W.*, 551 So. 2d 1186, 1190 (n.3) (Fla. 1989). For an appellate court panel to cite as its only "authority" the writings of a panel member **as a private advocate** before being appointed to the court also deprives the court of the pretense of impartiality.

App. 23

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82-836

THE CITY OF NORTH MIAMI, FLORIDA,

Petitioner,

v.

ARLENE KURTZ,

Respondent.

On Petition For Discretionary Review
Of An Order Of The Third District
Court Of Appeal of Florida
Case No. 92-2038

ANSWER BRIEF OF RESPONDENT

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II. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Does Article I, Section 23 of the Florida Constitution prohibit a municipality from requiring job applicants to refrain from using tobacco or tobacco products for one year before applying for, and as a condition for being considered for, employment, even where the use of tobacco is not related to job function in the position sought by the applicant?

The petitioner City of North Miami (hereinafter "the City") suggests that, despite the Third District Court of Appeal's certification of the above question, the issue is actually one of whether a government employer should be compelled to "subsidize" the costs of smoking. This suggestion mischaracterizes the factual and legal issues in this case. The fact that an employee may use part of his or her wages to buy a carton of cigarettes does not mean that the employer is "subsidizing" that employee's smoking, anymore than the employer is "subsidizing" the

employee's purchase of clothing, food or shelter. The City would like to characterize a paycheck as a subsidy of its employees' personal activities, however, in order to justify controlling the private lives of its employees and prospective employees by refusing to "subsidize," i.e., to pay a paycheck to, those persons of whose private activities the City disapproves.

In fact, this case does not involve any claim of entitlement to a subsidy or any form of special treatment for smokers. Rather, this case is about whether certain City job applicants should be deprived of *equal* treatment on the basis of private, lawful, off-duty conduct such as smoking, where such conduct does not relate to the job functions of the position applied for. The Third District Court of Appeal has therefore properly and succinctly stated the question of great public importance involved in this case.

* * *

V. SUMMARY OF ARGUMENT

The Third District correctly ruled that Administrative Regulation 1-46 is unconstitutional under article I, section 23 of the Florida Constitution.

The decision whether or not to engage in lawful conduct, such as smoking, in one's own free time, is a matter of personal autonomy and privacy protected by article I, section 23, of the Florida Constitution. The City's Administrative Regulation 1-46 intrudes into the private lives of its employees and prospective employees, including Kurtz, by requiring all job applicants to refrain from

this lawful, private conduct for a year as a condition of applying for any City job, regardless of whether or not smoking is related to job functions or performance. In order to justify such an intrusion, the City would have to demonstrate that the regulation serves a compelling governmental interest, and that the regulation is the least intrusive means of achieving that goal.

The City's asserted interest in reducing its smoking-related medical and productivity costs cannot be deemed compelling where most or all of these costs are associated with on-the-job smoking, not with the pre-hiring and off-duty smoking prohibited by Administrative Regulation 1-46. Even if the City could establish a compelling interest in reducing such costs, its regulation is not the least intrusive means of achieving this goal. Rather, because the regulation applies to all City job applicants, regardless of their qualifications and regardless of whether or not smoking is relevant to the functions of the job sought, Administrative Regulation 1-46 is the most intrusive means the City could use to obtain its asserted objective of reducing smoking-related costs.

Even if the Court were to hold that the City need not demonstrate a compelling interest to justify its no-smoking hiring regulation, Administrative Regulation 1-46 would still be violative of article I, section 23, because that regulation is not rationally related to any legitimate governmental interest of the City. The regulation is irrational as a means of achieving reductions in medical and productivity costs, because the regulation applies to all smokers, whether or not they are healthy, and whether or not they are qualified for, and perform satisfactorily at, any particular City job.

Regardless of whether the "compelling state interest" or "rational relationship" standard applies in this case, Administrative Regulation 1-46 is unconstitutional under article I, section 23 of the Florida Constitution.

VI. ARGUMENT

A. The City's regulation violates the privacy guarantee of the Florida Constitution, in that it constitutes governmental intrusion into private, off-duty conduct unrelated to *any* compelling interest of the City

The City's no-smoking hiring regulation constitutes governmental intrusion into the private lives of citizens for the purpose of regulating lawful, off-duty conduct unrelated to any compelling governmental interest. For citizens, such as the plaintiff, who refuse to submit to this indirect regulation, the penalty is a denial of all opportunity to seek or obtain employment in City government.

Kurtz has not asserted, as the City suggests, that she has a constitutional "right to smoke." Rather, she has a constitutionally protected right not to be subjected to the City's regulation of her private, off-duty life and lawful, off-duty conduct as a condition of seeking and obtaining the same government employment opportunities available to other citizens.

Article I, section 23, of the Florida Constitution provides, "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." This explicit constitutional right of privacy is far broader than that provided by the general due process language of the U.S.

Constitution. *In re T.W.*, 551 So.2d 1186, 1192 & n.5 (Fla. 1989); *Shaktman v. State*, 553 So.2d 148, 151 n.9 (Fla. 1989); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla. 1985). In cases involving violations of the privacy guarantee, the government has the burden of demonstrating a "compelling state

* * *

VII. CONCLUSION

On the basis of the arguments and authorities set forth above, the respondent requests that the question certified by the Third District Court of Appeals be answered in the affirmative, and that the decision of the Third District in this case be approved.

Respectfully submitted,

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THE SUPREME COURT OF FLORIDA

CASE NO.: 82,836

THE CITY OF NORTH MIAMI, FLORIDA,

Petitioner,

vs.

ARLENE KURTZ,

Respondent.

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT

Case No. 92-2038

PETITIONER'S REPLY BRIEF

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ARGUMENT

KURTZ's incessant commentary about the evidence succeeds in sidetracking the discussion away from the important issues and might actually mislead the Court about the factual basis for the City's policy. The following factual rebuttal thus becomes unavoidable:

A. It is too late for KURTZ to dispute the evidence at this state of the proceeding: The City submitted to Circuit Judge Shapiro volumes of medical, economic and scientific data, affidavits by public officials and Dr. SHULTZ (a national authority on smoking and health), and a great many other evidentiary materials all of which conclusively proved that its policy was justified by the empirical facts and advanced urgent public and governmental objectives consistent with officially-announced national health policy. KURTZ submitted **no** substantive evidence or testimony to rebut or contradict that showing because, she asserted, the case should be decided in an evidentiary vacuum, purely as a matter of abstract principle. KURTZ did not even depose Dr. SHULTZ about his data or findings; nor did she depose any of the witnesses identified by Mr. FELDMAN as the City's experts on such topics as the City's employment policies and hiring practices, and its insurance and medical expenses and procedures.[1]

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[1] Mr. FELDMAN in his deposition repeatedly informed KURTZ's attorney that many of her questions pertained to the data provided by Dr. SHULTZ, or to information possessed by the officials he specifically identified to be in charge of the City's insurance program, personnel department, department of administration, and smoking-cessation programs. See, e.g.,

KURTZ did not depose the principal witness in the case (Dr. SHULTZ) and did not submit **any** expert testimony or, indeed, **any** empirical evidence whatever to contradict or challenge the City's medical and economic data, and when she moved for summary judgment she advised Judge SHAPIRO that all of the evidence was **undisputed** and **irrelevant**. See Jan. 7, 1992 transcript at pp. 23, 46. Judge SHAPIRO correctly decided that the evidence was hardly "irrelevant," and his ruling thus contained specific findings of fact based on **undisputed evidence**, and not one of his findings was questioned or even mentioned by the Third District.

However uncomfortable it may be for her, KURTZ made her own bed and must now lie in it. It would be terribly unfair to the City for KURTZ to be permitted, two appellate courts removed from the evidentiary stage of the proceeding, to begin remaking her bed to generate "factual disputes" which did not exist in the trial court **when such factual disputes could have been dealt with and resolved.**[2]

FELDMAN depo. at 12-35, 39. **KURTZ deposed none of these witnesses**. In her brief KURTZ nevertheless denigrates FELDMAN's supposed lack of knowledge on these very same topics, i.e., the efficacy of the City's smoking cessation program (actually operated by Mr. LAPIRA; FELDMAN depo. at 29-31), and the City's health-screening procedures (operated by Mr. ZEIEN; FELDMAN depo. at 47-50). KURTZ likewise refers to the City's supposed policies concerning obese and diabetic candidates, even though Mr. FELDMAN stated that Mr. ZEIEN had that information, and that the City was barred by federal law from refusing to hire persons with those conditions (see FELDMAN depo. at 103-104).

[2] If KURTZ had disputed the City's evidence at the proper time, before the trier of fact, then FELDMAN or SHULTZ could

B. KURTZ's factual statements are false and/or misleading: KURTZ's brief contains dozens of "factual" statements none of which are strictly true and most of which are highly misleading. For example, at page 7 of her brief, KURTZ writes, citing pages 17-19 of the SHULTZ affidavit (emphasis in original):

> Significantly the experts stated that all of an employer's lost productivity costs related to employee smoking could be eliminated by a prohibition of on-the-job smoking.

This statement is doubly false for at that point in his affidavit Dr. SHULTZ was merely referring to the findings of one other researcher among the 90 which he cited (not to his own findings); and moreover the KURTZ

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have submitted supplemental testimony; or the City could have argued to the trier of fact what the testimony and evidence actually proved; or LAPIRA, ZEIEN and MEARS could have rebutted the misleading "factual statements" which now appear in KURTZ's Supreme Court brief. (As a matter of fact, the City initially made arrangements to obtain additional witnesses and evidence, including direct testimony from former Surgeon General Koop, but abandoned those efforts **because** KURTZ stipulated that she did not dispute the City's medical and economic data and findings.) Not only would it constitute the worst sort of "sand-bagging" for KURTZ to evade her stipulation that the evidence was undisputed, but it would also be **bizarre** to permit a plaintiff to argue her case at the evidentiary stage as a "pure theory" case, yet then in the Florida Supreme Court portray the case as an "evidentiary dispute" – that would literally reverse the proper order of things.

phrase "all of a employer's lost productivity costs" actually refers to only about $100 per year in costs attributable to on-the-job smoking which do not include **any** of the major costs of smoker illnesses and absenteeism.[3]

Another example is KURTZ's deliberate misconstruction of the term "subsidization." KURTZ heatedly asserts that it is no subsidy for an employee to use part of his wages to purchase cigarettes, but KURTZ knows full well that the City never suggested any such thing. The City said it was a subsidy for the public to have to pay **extra**

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[3] Dr. SHULTZ was thus reporting the virtual tautology that if an employer did not allow smoking employees to smoke on the job, then a small amount of money would be saved even if the employee continued to smoke off the job (i.e., because they would not burn up their offices), which is utterly different from saying (as KURTZ does in her brief) that prohibiting on-the-job smoking eliminates "all lost productivity costs" arising from the employment of smoking employees. (In fact, the City's undisputed financial projections reflect that even **that** study indicates that the City's policy will save at least $2.5 million.) The important point is that KURTZ's distortion of the term "lost productivity costs" was not inadvertent since it was carefully teased out of the tables contained in the SHULTZ affidavit.

Another example of KURTZ's distortion of the record is her statement that SHULTZ's affidavit was based on a comparison of "never smokers" and therefore did not support the City's policy which was geared to the "one-year non-smoking" of candidates. That is a distortion of the SHULTZ affidavit, which referred to a single study involving "never smokers" but based its findings on 90 studies listed at the end of his affidavit, and in fact, **specifically** addressed the significance of the "one-year period of successful cessation." (See SHULTZ affidavit at 22). Furthermore, the City's policy cannot be unconstitutional on the theory that the evidence would warrant a policy even more restrictive than the policy actually adopted!

dollars over and above wages for the expensive consequences of some of its employees' "off-duty" behavior.[4]

Another example is the canard that the City does not give smokers the option of waiving insurance or accepting a surcharge commensurate with their higher medical expenses and lower productivity. The record is undisputed that the City **cannot** implement such measures (because of collective-bargaining restrictions), and that it is a fundamental employment policy of the City that all its employees receive full medical insurance at no cost. (See, e.g., FELDMAN depo. at 35-37, 44-46, 67-68; HARTSTEIN depo. at 179). If KURTZ doubted that testimony

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[4] It is no subsidy for an employee to use her wages for private pleasures, but it is a subsidy to require the public to also pick up the tab for the consequential expenses of such private pleasures. That is precisely why the United States Supreme Court rejected the argument that constitutional privacy compelled the public to subsidize the costs of abortions for welfare recipients; not because the recipients were being prevented from using their public assistance monies for abortion, but rather because the public was not obligated to pay additional money for that service. That ruling, moreover, was in the context of an established constitutional right to purchase an abortion, while here there is no constitutional right to buy or use tobacco, a point which even KURTZ finally seems to concede at page 16 of her brief. (And the Court should note that Federal law actually **does** prohibit Food Stamp subsidies to be used for tobacco!) In other words, KURTZ would lose even if she demanded that the townspeople of North Miami pay her extra for the medical costs of an abortion, which **is** a constitutionally-protected behavior, so she certainly cannot demand that the townspeople pick up the tab for other medical costs **not even related** to a constitutionally-protected behavior. **That** is why the City maintains that this case is more like the "helmetless motorcycling" case *Picou*, 874 F.2d 159 (11th Cir. 1989), rather than any case involving a constitutionally-protected form of conduct.

and believed that such alternative measures were possible, she should have introduced testimony or evidence to support her skepticism.[5]

Another example is KURTZ's statement that the policy is inequitable because the City does not exclude persons with other conditions and habits, but the record is undisputed that the City does indeed screen the health of all applicants (FELDMAN depo. at 47-50); and KURTZ knows full well that Federal law precludes the City from declining to hire persons with the physical conditions she enumerates.[6]

Another distortion is KURTZ'S assertion that the City's policy allows it to accept "less qualified" nonsmokers over "more qualified" smokers. That begs an empirical question which is not at issue since the **undisputed** evidence is that a workforce of nonsmokers is by definition "more qualified" from the public's perspective than a workforce of smokers, since on average each

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[5] Likewise there is no evidence in the record to support KURTZ'S contention that potential job applicants are being forced to change their behavior as a result of the City's policy, rather than simply applying for other jobs.

[6] Moreover, KURTZ cannot be arguing that the City policy would be constitutional if only the City excluded skydivers or couch potatoes along with smokers, which is no privacy argument at all but rather an equal protection argument, and a specious one at that. Underinclusion has never been a basis for striking down a rational classification scheme, and if it were, then the Third District opinion would itself violate the Fourteenth Amendment because it grants absolute protection to users of a single plant substance without assuring equal protection to all other similarly-situated flora users who are affected by exclusionary hiring practices based on private practices far less injurious to the public interest than that of tobacco-users.

smoking worker costs the City roughly an extra $70,000 over 15 years. It is too late for KURTZ to retract her stipulation that the City's data was undisputed, and there is nothing in the record to support her speculation concerning the effect of the policy on applicant quality. Moreover, since KURTZ concedes that there are numerous qualified applicants for a particular job (brief at 11), the real question is: **IF KURTZ AND HER NON-SMOKING TWIN, IN EVERY OTHER RESPECT IDENTICAL TO HER, WERE BOTH TO APPLY FOR A JOB AT THE CITY, DOES THE FLORIDA CONSTITUTION ACTUALLY FORBID THE CITY FROM PREFERRING THE NON-SMOKING TWIN NO MATTER HOW OVERWHELMING THE EVIDENCE THAT THE NON-SMOKING TWIN WILL BE A MORE PRODUCTIVE PUBLIC SERVANT AND COST $70,000 OR $100,000 LESS TO EMPLOY?** Since KURTZ apparently would answer that question "Yes, it does," it is **she** who is advocating irrationality by the government!

Some of KURTZ's "factual statements" are preposterous, for example, her statement that the City's economic analysis "was not based on actual medical or productivity costs' experience," a comment which suggests that KURTZ is unfamiliar with even the most basic precepts of scientific and rational thought. If 30,000 studies confirmed that people who jump off high buildings do not sprout wings (as they have confirmed the medical and economic consequences of tobacco use), then both Mr. FELDMAN and Ms. KURTZ can rationally conclude they won't either, without leaping to their deaths for the "actual experience" of impacting the pavement. The evidence submitted to the circuit court, evidence which KURTZ stipulated was not disputed and which she

deemed "irrelevant" at that time, proved **conclusively** the medical and economic consequences of employing smokers.[7]

Another example of distortion is KURTZ's statement, repeated more than a half-dozen times, that an "on-duty" smoking ban would be equally effective without encroaching privacy rights. The testimony and evidence actually reflect that "on-duty" smoking bans are **ineffective** because smokers, being drug addicts, must then continually go "off-duty" for a fix and thereby further reduce productivity without improving their illness rates or medical expenses; some of that evidence was even cited in Petitioner's Initial Brief at pp. 12-13.[8]

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[7] Equally foolish is KURTZ's attack on FELDMAN's cost analysis because it assumed a four percent inflation rate (so what?), and was based on the findings of four alternative studies. KURTZ **did not introduce any evidence** contradicting any of those projections, and stipulated that **they were not disputed,** and even now she fails to explain what is wrong with offering a range of economic forecasts based on the leading empirical studies in the ~~field~~. But this is a "red herring" anyway since **even Ms. KURTZ and her attorney** conceded in the trial court **and the Third District** that smokers did have significantly higher illness rates and medical expenses, a fact which no sane person could dispute.

[8] Moreover, KURTZ has carefully avoided defining what she means by the term "on-duty smoking ban," which is no accident since it was KURTZ who argued below that the City's policy was preempted by the FCIAA, ch. 385, *Fla. Stat.* (1989) which barred local regulation of indoor smoking in public facilities. Alternatively, if KURTZ intends the term "on duty" to mean "during working hours" (whether an employee is inside a public facility or not, on break or not, on duty or off duty), then the ACLU is apparently advocating that public employees be literally chained to their desk, electronically monitored, or

While the City could continue to itemize all the misleading "factual" statements in KURTZ's brief, there would then be no space left to address the constitutional principles at issue here, which are much too important to be lost in the KURTZ smokescreen of non sequitur and solecism.[9]

C. KURTZ's statements about the privacy case law are incorrect: KURTZ writes that *Winfield, In re T.W.*, and *In re Browning* are relevant because the City, for ideological reasons, is seeking to mandate a healthy and wholesome lifestyle. But there is not one shred of evidence in the record to support that statement, and it is refuted by the obvious fact that the City has not implemented any smoking policy to restrict or govern the behavior of

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shadowed by the "smoking police" whenever they depart a government facility, which is precisely what occurred during *Grusendorf* and is a far more intrusive policy than the one actually at issue.

[9] Incidentally, KURTZ takes umbrage at the City's suggestion of tobacco-industry contributions to the ACLU, yet never actually disputes or denies that suggestion and instead erects a "straw man" argument that KURTZ's **counsel** did not personally receive tobacco industry funding (which the City never suggested). In point of fact, during KURTZ's deposition the City specifically inquired about funding for the litigation and KURTZ's attorney objected and stated that she had no obligation to disclose the funding source but that the tobacco industry may have provided funding to the ACLU.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 91-3165 CA-15

ARLENE KURTZ,

Plaintiff,

vs.

THE CITY OF NORTH MIAMI, FLORIDA,

Defendant.
_____/

TABLE OF CONTENTS FOR DEFENDANT'S COMPOSITE EXHIBITS "I" THROUGH "IV"

A. Composite Exhibit "I":

1. "Journal of Public Health Policy", The Minnesota Plan for Nonsmoking and Health: The Legislative Experience, by James M. Schultz, et. al.

2. "The Milbank Quarterly", The Economic Costs of the Health Effects of Smoking, 1984, by Dorothy P. Rice, et. al. (Cambridge University, Vol. 64, No. 4, 1986).

3. "U.S. News & World Report", Big Tobacco's Toughest Road by Andy Plattner, (April 17, 1989).

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12. "Economic Costs of Smoking & Benefits of Quitting for Individual Smokers" by Gerry Oster, et. al., (Academic Press, Inc. 1984).

13. "Health and Economic Implications of a Tobacco-Free Society" by Kenneth E. Warner, Ph.D., (Journal of the American Medical Association, October 16, 1987, Vol. 258).

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B. Composite Exhibit II:

1. "Guide to Public Health Practice: State Health Agency Tobacco Prevention and Control Plans" by Association of State and Territorial Health Officials, et. al.

2. "Smoking, Tobacco & Health", a Fact Book.

3. "Smoking and Health, A National Status Report", A Report to Congress Second Edition.

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C. Composite Exhibit III:

1. "Surgeon General's Warning".

2. "Smoking's Cost to Society is $52 Billion a Year, Federal Study Says" by Philip J. Hilts, The New York Times National.

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4. "MMWR Morbidity and Mortality Weekly Report", Smoking-Attributable Mortality and Years of Potential Life Lost – U.S. 1988, (February 1, 1991, Vol. 40, No. 4).

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18. "Health and Economic Implications of a Tobacco-Free Society" by Kenneth E. Warner, Ph.D., JAMA, (October 16, 1987, Vol. 258, No. 15).

19. "The Health Consequences of Smoking, Nicotine Addiction", A report of the Surgeon General.

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21. "Economic Incentives to Reduce Employee Smoking: A Health Insurance Surcharge for Tobacco Using State of Kansas Employees" by Maurice Penner, (September/October 1989, Vol. 4, No. 1).

22. "Measuring Medical Cost and Life Expectancy Impacts of Changes in Cigarette Scales" by Barbara C. Lippiatt, M.A.

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D. **Composite Exhibit IV, Part I and Part II:**

1. "Reducing the Health Consequences of Smoking, 25 Years of Progress", a report of the Surgeon General, (1989).

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